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N. 3017 **No. 15297**

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner and Respondent,

vs.

TECHNICOLOR MOTION PICTURE CORPORATION and LOCAL 683 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, AFL-CIO, Respondents and Petitioners.

Transcript of Record

Petition For Enforcement and Petition For Review of An Order of the National Labor Relations Board.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. 12-17-56

No. 15297

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner and Respondent,

vs.

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

GENERAL COUNSEL'S EXHIBIT No. 1-C

United States of America
National Labor Relations Board

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

Case No. 21-CB-698. Date Filed: 2-14-55.

1. Labor Organization or Its Agents Against Which Charge Is Brought: Local 683 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL.

Address: 6721 Melrose Avenue, Hollywood 38, California.

The above-named organization or its agents has engaged in and is engaging in unfair labor practices within the meaning of Section (8b) Subsections (1) (A) and (2) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge:

The above-named labor organization by numerous requests and threats caused Technicolor Motion Picture Corporation to discriminate against Hayden A. Balthrope in regard to tenure of employment on February 10, 1955, in violation of Section 8 (a) (3) of the Act and for a reason other than

Balthrope's failure to tender periodic dues and initiation fees uniformly required, and

By this and other activities said labor organization restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act.

3. Name of Employer: Technicolor Motion Picture Corporation.

4. Location of Plant Involved: 6311 Romaine Street, Hollywood, California.

5. Type of Establishment: Film processing laboratories.

6. Identify Principal Product or Service: Film Processing.

7. No. of Workers Employed: 1800.

8. Full Name of Party Filing Charge: Hayden A. Balthrope.

9. Address of Party Filing Charge: 1415 South Eighth Street, Alhambra, California.

10. Tel. No.: AT 1-2320.

11. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

Date: February 14, 1955.

/s/ By HAYDEN A. BALTHROPE,
An Individual

GENERAL COUNSEL'S EXHIBIT No. 1-D

United States of America
National Labor Relations Board

CHARGE AGAINST EMPLOYER

Case No. 21-CA-2172. Date Filed: 2-14-55.

1. Employer Against Whom Charge Is Brought: Technicolor Motion Picture Corporation.

Number of Workers Employed: 1800.

Address of Establishment: 6311 Romaine Street, Hollywood, California.

Type of Establishment: Film processing laboratories.

Identify Principal Product or Service: Film processing.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a), Subsections (1) and (3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge: On February 10, 1955, the above-named Employer discriminated in tenure of employment against Hayden A. Balthrope at the request of and to encourage membership in Local 683, International Alliance of Theatrical Stage Em-

ployes and Moving Picture Machine Operators of the United States and Canada, and

Said Employer thereby interfered with, restrained and coerced its employees in the exercise of their rights under Section 7 of the Act.

3. Full Name of Party Filing Charge: Hayden A. Balthrope.

4. Address: 1415 South Eighth Street, Alhambra, California. Telephone No.: AT 1-2320.

* * * * *

7. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

Date: February 14, 1955.

/s/ By HAYDEN A. BALTHROPE,
An Individual

GENERAL COUNSEL'S EXHIBIT No. 1-E

United States of America
Before the National Labor Relations Board
Twenty-First Region

Case No. 21-CA-2172

TECHNICOLOR MOTION PICTURE CORPORATION and HAYDEN A. BALTHROPE, An Individual.

Case No. 21-CB-698

LOCAL 683 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, AFL and HAYDEN A. BALTHROPE, An Individual.

CONSOLIDATED COMPLAINT

It having been charged by Hayden A. Balthrope, an individual, that Technicolor Motion Picture Corporation, hereafter called Technicolor, and Local 683 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL, hereafter called IATSE, have engaged in and are engaging in certain unfair labor practices affecting commerce as set forth and defined in the Labor Management Relations Act, 61 Stat. 136, hereafter referred to as the Act, the General Counsel of the

National Labor Relations Board, by the Acting Regional Director for the Twenty-First Region, designated by the Board's Rules and Regulations, Series 6, as amended, Section 102.15, hereby issues this Consolidated Complaint and alleges as follows:

1. Technicolor is and at all times relevant hereto has been a corporation organized and existing by virtue of the laws of the State of Maine engaged in the processing of photographic film, having its main office and place of business in the city of Los Angeles, State of California.

2. In the course of its activities as set forth above Technicolor performs services valued in excess of $1,000,000 annually for motion picture producers who ship their product valued in excess of $300,000 annually to and through states of the Union other than the State of California.

3. IATSE is, and at all times relevant hereto has been, a labor organization within the meaning of Section 2, subsection (5) of the Act.

4. On or about July 31, 1954, Technicolor and IATSE, by their respective officers, agents and representatives, entered into a contract providing that Technicolor recognize IATSE as the exclusive bargaining representative of all classifications listed therein and listing therein among other classifications the classification of film technician and providing further that each and every employee subject to the agreement shall be and remain a member in good standing of the Union on and after the

thirtieth day following the beginning of his first employment or the effective date of the agreement, whichever is the later.

5. On or about December 7, 1954, Hayden A. Balthrope, the charging party herein, paid to IATSE the sum of $250 and at the same time submitted to the said IATSE an application for membership in said organization, which application and payment by charging party have been retained by IATSE.

6. Since on or about August 31, 1954, and specifically on or about October 1, 1954, November 10, 1954, the latter part of January 1955 and the early part of February 1955, IATSE, by its officers, agents and representatives, requested and demanded that Technicolor discharge the said Hayden A. Balthrope, a film technician employed by Technicolor for his failure to tender the periodic dues and initiation fees uniformly required as a condition for retaining membership in the Union.

7. On or about February 10, 1955, IATSE, by its officers and agents, caused Technicolor to discharge the said Hayden A. Balthrope because of his nonmembership in IATSE, notwithstanding that IATSE had at that time in its possession initiation fees tendered by the said Hayden A. Balthrope.

8. Prior to his discharge on or about January 27, 1955, the said Hayden A. Balthrope informed Technicolor, through its officers and agents, that he had paid his initiation fee and applied for membership in IATSE.

9. On or about February 10, 1955, Technicolor, by its officers and agents, discharged the said Hayden A. Balthrope at the request of IATSE.

10. By the acts and conduct set forth and described in paragraph 9 above, Technicolor did discriminate and is now discriminating in regard to hire and tenure of its employees to encourage membership in the Union and did thereby engage in and is now engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

11. By the acts and conduct set forth and described in paragraph 9 above, Technicolor did interfere with, restrain and coerce and is now interfering, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act and did thereby engage in and is now engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

12. By the acts and conduct set forth and described in paragraphs 6 and 7 above, IATSE has restrained and coerced and is now restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8 (b) (1) (A) of the Act.

13. By the acts and conduct set forth and described in paragraphs 6 and 7 above, IATSE has caused and has attempted to cause and is now causing and attempting to cause Technicolor to discriminate against employees in violation of Section 8 (a) (3) of the Act, and IATSE has thereby violated and is thereby violating Section 8 (b) (2) of the Act.

14. The activities of Technicolor and of IATSE, and each of them, as set forth and described in paragraphs 4 through 13 above, occurring in connection with the operations of Technicolor as described in paragraphs 1 and 2 above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states in the United States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

15. The aforesaid acts of Technicolor and of IATSE, and each of them, as set forth and described in paragraphs 4 through 11 above, constitute unfair labor practices affecting commerce within the meaning of Section 8 (a), subsections (1) and (3), Section 8 (b), subsections (1) and (2), and Section 2, subsections (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Acting Regional Director for the Twenty-First Region, this 25th day of August, 1955, issues this Consolidated Complaint against Technicolor Motion Picture Corporation and Local 683 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL.

[Seal] /s/ GEO. A. YAGER,
Acting Regional Director, National Labor Relations Board, Twenty-First Region.

GENERAL COUNSEL'S EXHIBIT No. 1-I

[Title of Board and Causes.]

ANSWER TO CONSOLIDATED COMPLAINT

Comes now, Film Technicians, Local No. 683, I.A.T.S.E., Respondent in the above-entitled proceeding, and answers the Consolidated Complaint herein issued on August 25, 1955, by the Acting Regional Director for the Twenty-First Region, acting for the General Counsel on behalf of the National Labor Relations Board, pursuant to Section 102.20 of the Rules and Regulations and admits, denies, and alleges as follows:

I.

Respondent, Film Technicians Local No. 683, I.A.T.S.E., admits that Technicolor is a corporation engaged in the processing of photographic film, having its main office and place of business in the City of Los Angeles, State of California, but other than such admission states that it does not have sufficient information upon which to form a belief, and based upon such lack of information and belief, specifically denies each and every, all and singular, the remaining allegations contained in Paragraph 1 of the Consolidated Complaint herein.

II.

Answering Paragraph 2 of the Consolidated Complaint herein, Respondent admits the allegations therein contained.

III.

Answering Paragraph 3 of the Consolidated Complaint herein, Respondent admits the allegations contained therein.

IV.

Answering Paragraph 4 of the Consolidated Complaint herein, Respondent admits the allegations therein contained.

V.

Answering Paragraph 5 of the Consolidated Complaint herein, Respondent admits the allegations contained therein.

VI.

Answering Paragraph 6 of the Consolidated Complaint herein, Respondent denies the allegations contained therein.

VII.

Answering Paragraph 7 of the Consolidated Complaint herein, Respondent denies the allegations contained therein.

VIII.

Answering Paragraph 8 of the Consolidated Complaint herein, Respondent states that it does not have sufficient information upon which to form a belief, and based upon such lack of information and belief, denies the allegations therein contained.

IX.

Answering Paragraph 9 of the Consolidated Complaint herein, Respondent denies each and every, all and singular, the allegations therein contained, except that it admits that on or about February 10,

1955, Technicolor discharged Hayden A. Balthrope for failure to tender the initiation fees uniformly required as a condition of acquiring or retaining membership in Respondent Local 683 within thirty days after the effective date of a valid union shop agreement, and that Technicolor was previously notified of such non-tender on the part of Hayden A. Balthrope by Respondent Local 683 on or about October 1, 1954, as permitted by the proviso to Section 8 (a) (3) of the Act.

X.

Answering Paragraph 10 of the Consolidated Complaint herein, Respondent denies each and every, all and singular, the allegations therein contained.

XI.

Answering Paragraph 11 of the Consolidated Complaint herein, Respondent denies each and every, all and singular, the allegations therein contained.

XII.

Answering Paragraph 12 of the Consolidated Complaint herein, Respondent denies each and every, all and singular, the allegations therein contained.

XIII.

Answering Paragraph 13 of the Consolidated Complaint herein, Respondent denies each and every, all and singular, the allegations therein contained.

XIV.

Answering Paragraph 14 of the Consolidated Complaint herein, Respondent denies each and every, all and singular, the allegations therein contained.

XV.

Answering Paragraph 15 of the Consolidated Complaint herein, Respondent denies each and every, all and singular, the allegations therein contained.

XVI.

The post office address of Respondent Local 683, I.A.T.S.E., is as follows: 6721 Melrose Avenue, Hollywood 38, California.

XVII.

Respondent Local 683, I.A.T.S.E., is represented in this proceeding by Gilbert, Nissen & Irvin, attorneys at law, whose offices are located in Suite 317, W. M. Garland Building, 117 West Ninth Street, Los Angeles 15, California.

Wherefore, Respondent Film Technicians Local No. 683, I.A.T.S.E. prays that the Consolidated Complaint herein be withdrawn, vacated, set aside, or dismissed forthwith.

Dated this 26th day of August, 1955.

GILBERT, NISSEN & IRVIN,
/s/ By ROBERT W. GILBERT,
Attorneys for Respondent, Film Technicians Local No. 683, I.A.T.S.E.

Duly Verified.

GENERAL COUNSEL'S EXHIBIT No. 1-M

[Title of Board and Causes.]

ANSWER TO CONSOLIDATED COMPLAINT

Comes now, Technicolor Motion Picture Corporation, Respondent in the above-entitled proceeding, and answers the Consolidated Complaint herein issued on August 25, 1955, by the Acting Regional Director for the Twenty-First Region, acting for the General Counsel on behalf of the National Labor Relations Board, pursuant to Section 102.20 of the Rules and Regulations and admits, denies, and alleges as follows:

I.

Respondent, Technicolor Motion Picture Corporation, admits that Technicolor is a corporation engaged in the processing of photographic film, having its main office and place of business in the City of Los Angeles, State of California, but other than such admission, specifically denies each and every, all and singular, the remaining allegations contained in Paragraph 1 of the Consolidated Complaint herein.

II.

Answering Paragraph 2 of the Consolidated Complaint herein, Respondent Technicolor admits the allegations therein contained.

III.

Answering Paragraph 3 of the Consolidated Complaint herein, Respondent Technicolor admits the allegations contained therein.

IV.

Answering Paragraph 4 of the Consolidated Complaint herein, Respondent Technicolor admits the execution of the contract therein described by Technicolor and Local 683 on July 31, 1954, and the execution, ratification, and approval of said contract by the International Representative of the I.A.T.S.E. on August 31, 1954.

V.

Answering Paragraph 5 of the Consolidated Complaint herein, Respondent Technicolor, upon information and belief, admits the allegations therein contained.

VI.

Answering Paragraph 6 of the Consolidated Complaint herein, Respondent denies the allegations contained therein.

VII.

Answering Paragraph 7 of the Consolidated Complaint herein, Respondent denies the allegations contained therein.

VIII.

Answering Paragraph 8 of the Consolidated Complaint herein, Respondent admits the allegations therein contained.

IX.

Answering Paragraph 9 of the Consolidated Complaint herein, Respondent denies each and every, all and singular, the allegations therein contained, except that it admits that as required by the terms of a valid union shop agreement then existing between

Technicolor and the I.A.T.S.E., on or about February 10, 1955, Technicolor discharged Hayden A. Balthrope for failure to tender the initiation fees uniformly required as a condition of acquiring or retaining membership in Respondent Local 683 within thirty days after the effective date of said valid union shop agreement, and that Technicolor was previously notified of such non-tender on the part of Hayden A. Balthrope by Respondent Local 683 and requested to discharge said employee on or about October 1, 1954, as permitted by the proviso to Section 8 (a) (3) of the Act.

X.

Answering Paragraph 10 of the Consolidated Complaint herein, Respondent denies each and every, all and singular, the allegations therein contained.

XI.

Answering Paragraph 11 of the Consolidated Complaint herein, Respondent denies each and every, all and singular, the allegations therein contained.

XII.

Answering Paragraph 12 of the Consolidated Complaint herein, Respondent denies each and every, all and singular, the allegations therein contained.

XIII.

Answering Paragraph 13 of the Consolidated Complaint herein, Respondent denies each and every, all and singular, the allegations therein contained.

XIV.

Answering Paragraph 14 of the Consolidated Complaint herein, Respondent denies each and every, all and singular, the allegations therein contained.

XV.

Answering Paragraph 15 of the Consolidated Complaint herein, Respondent denies each and every, all and singular, the allegations therein contained.

XVI.

The post office address of Respondent Technicolor is as follows: 6311 Romaine Street, Hollywood, California.

XVII.

Respondent Technicolor is represented in this proceeding through its counsel, Cohen & Roth, by Lester Wm. Roth, Esq., attorneys at law, whose offices are located in Suite 205, 300 South Beverly Drive, Beverly Hills, California.

Wherefore, Respondent Technicolor Motion Picture Corporation prays that the Consolidated Complaint herein be withdrawn, vacated, set aside, or dismissed forthwith.

Dated this 1st day of September, 1955.

COHEN & ROTH,
/s/ By LESTER WM. ROTH,
Attorneys for Respondent Technicolor Motion Picture Corporation

Duly Verified.

GENERAL COUNSEL'S EXHIBIT No. 2

[Title of Board and Causes.]

STIPULATION

The following stipulated set of facts is agreed upon between the Technicolor Motion Picture Corporation, by its attorneys Cohen and Roth by Lester William Roth; Local 683 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL, by its attorneys Gilbert, Nissen and Irvin by Louis A. Nissen, and the General Counsel of the National Labor Relations Board by his representative Paul E. Weil:

1. On or about July 31, 1954, Technicolor Motion Picture Corporation and Local 683 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL, respondents in the above-numbered proceedings, respectively, hereinafter referred to as the Company and the Union, entered into a contract as described in paragraph 4 of the Consolidated Complaint in these cases, the validity or legality of which contract and the union-security clause contained therein are not in issue in these proceedings.

2. There is no issue in these proceedings that the charging party, Hayden A. Balthrope, knew of the execution of the July 31, 1954 agreement, shortly after the said execution of said contract and union-security clause but no later than September 7, 1954,

and the language of the union-security clause therein contained, and admits being informed by management officials and gaining knowledge from other sources, of the execution of such contract.

Prior to the execution of the July 31, 1954 agreement between the Company and the Union there had been no union-security provision existing between the Company and the Union, and Balthrope, although he had been employed for a number of years preceding the July 31, 1954 agreement, had made no application for membership in nor tendered initiation fees to the Union.

3. Balthrope failed to apply for membership and join the Union in conformance with and as required by the union-security provision of the July 31, 1954 collective bargaining agreement. Upon the failure of Balthrope to join the Union under the terms of the union-security provision of the contract, the Union made a written demand on August 31, 1954, that he be discharged pursuant to the collective bargaining agreement, (a copy of which demand is attached hereto, marked Exhibit A and made a part hereof). Article 3, Section b of the collective bargaining agreement referred to in Exhibit A reads as follows: "Within a reasonable time, but not to exceed 3 days, after receipt of written notice from the Union that any such employee is not a member as above required, the producer shall discharge any such employee, the producer shall not be in default unless it fails to act within said time after receipt of such notice." The Company refused to so discharge Balthrope.

Again on October 1, 1954, by letter identical to Exhibit A except as to date, the Union demanded the discharge of Balthrope by the Company pursuant to the collective bargaining agreement between the parties. The Company continued to fail so to do.

Numerous oral demands were made upon the Company that it live up to the terms of the collective bargaining agreement and pursuant to those terms discharge Balthrope. Such oral demands continued and were repeated until some date in January 1955. The Company continued to fail to accede to those demands.

4. On or about December 7, 1954, Balthrope made application for union membership and accompanied such application with his check for union initiation fees, uniformly required by the Union of all prospective members, and that said initiation fee uniformly required was the only sum which the Union asked or required of Balthrope that he deposit in connection with such application.

5. On February 7, 1955, the Local Union Executive Board approved Balthrope's application for union membership, which was also, some months later, approved by the International Union.

6. On February 10, 1955, Balthrope was discharged by the Company.

7. On February 10, 1955, the Union wrote Balthrope informing him of the acceptance of his application for membership and that the Union had secured another position for him with Consolidated Film Laboratories. (See Exhibit B attached hereto and made a part hereof.) Balthrope answered this

letter on February 15, 1955, stating he had arranged to take the position offered him at Consolidated Film Laboratories and to report for work there when he was available and thanking the Union for its assistance. He has been employed by that company under union contract continuously from the time he accepted his position until the present time at comparable wage rates.

TECHNICOLOR MOTION PICTURE CORPORATION,
By COHEN AND ROTH,
/s/ By LESTER W. ROTH

LOCAL 683 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, AFL

/s/ By LOUIS A. NISSEN,
GILBERT, NISSEN & IRVIN

/s/ By PAUL E. WEIL,
General Counsel

EXHIBIT A

Film Technicians Local 683
6721 Melrose Avenue, Hollywood 38, California

[Letterhead]

....., 1954

Mr. David S. Shattuck, Treasurer
Technicolor Motion Picture Corporation
6311 Romaine Street
Hollywood 38, California

Re: Employee Hayden Balthrope

Dear Mr. Shattuck:

We wish to advise your firm that employee Hayden Balthrope has failed to become and remain a member of the Film Technicians of the Motion Picture and Television Industries, Local 683, I.A.T.S.E., after the thirtieth day following the execution of our current Collective Bargaining Agreement as is required by Article 3, Paragraph (2) thereof. The records of this Union show that this employee has not made application to join the Union nor has he tendered the regular dues or initiation fees as required within the time limits provided.

Based upon the failure of this employee to complete membership in this Union, we hereby give Technicolor Corporation written notice in accordance with the requirements of Article 3, Paragraph (b) of the demand of this Union for the discharge of this employee, and further notify you that Tech-

nicolor Corporation will be deemed to be in default of its contract unless such discharge is completed within a reasonable time not to exceed three days after the receipt of this letter.

Very truly yours,

/s/ Alan Jackson
Alan Jackson
Business Representative

AJ:sh

EXHIBIT B
(Copy)

Film Technicians
Local 683, etc.
6721 Melrose Avenue, Hollywood 38, California
Webster 5-1123

February 10, 1955

Mr. Hayden A. Balthrope
1415 South 8th Avenue
Alhambra, Calif.

Dear Mr. Balthrope:

I am pleased to inform you that on February 7, 1955, the Executive Board of Local 683 voted to accept your application for membership, subject to the endorsement of the general office of the International Alliance, as provided by Article Twenty-one of the I. A. Constitution.

As soon as such endorsement by the general office is forthcoming, you will be notified as to the time and place of your induction into membership.

In accordance with the usual practice of Local 683, the facilities of this office are now available to

you for the purpose of rendering all possible assistance in obtaining employment within the jurisdiction of the Union for which you are qualified.

Since you have been discharged by Technicolor Motion Picture Corporation for previous failure to comply with the "Union Security" provisions of our contract, this office has undertaken to determine whether other comparable employment is presently available to you within the jurisdiction of the Union.

You are hereby officially notified, that a definite opening now exists at Consolidated Film Laboratories for a printer operator (W-25), at the contract rate of $2.60 an hour. One or more job openings also appear to exist for which you are eligible and qualified.

Please contact the undersigned at once so that you may be given the full details regarding this available employment, and may go to work immediately.

Sincerely yours,

/s/ David W. Arbuckle
David W. Arbuckle
Secretary-Treasurer

DWA/am
Registered-R.R.R.

[Title of Board and Causes.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Mr. Paul E. Weil, for the General Counsel. Messrs. Gilbert, Nissen & Irvin, by Mr. Louis A. Nissen, of Los Angeles, Calif., for the Respondent Union. Messrs. Cohen and Roth, by Mr. Lester William Roth, of Los Angeles, Calif., for the Respondent Company. Mr. Hayden A. Balthrope, pro se.

Before: Maurice M. Miller, Trial Examiner.

Statement of the Case

Upon charges duly filed and served in the name of Hayden A. Balthrope, to be designated as the Complainant herein, the General Counsel of the National Labor Relations Board, in the name of the Board, caused the Regional Director of its Twenty-first Region at Los Angeles, California, to issue a Consolidated Complaint and Notice of Hearing on August 25, 1955, under Section 10 (b) of the National Labor Relations Act, as amended, 61 Stat. 136. In the complaint, Technicolor Motion Picture Corporation, to be designated herein as the Respondent Company, was charged with the commission of certain unfair labor practices under Section 8 (a) (1) and (3) of the Act; Local 683 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL, herein designated as the Respondent Union, was charged with unfair labor practices under Section 8 (b) (1) (A) and

(2) of the statute. Copies of the Consolidated Complaint, the Notice of Hearing, and the charges previously mentioned were duly served upon the Respondent Company and the Union. Each of the respondents, in turn, thereafter filed an answer which denied the commission of the unfair labor practices charged.

As subsequently amended, the Consolidated Complaint alleged, in substance, that the Respondent Company and the Union had executed a trade agreement with a legal union-security clause; that the Respondent Union had thereafter "requested and demanded" the discharge of the Complainant by the Respondent Company because of his failure to submit an application for Union membership, and the initiation fee uniformly required of membership applicants, within the period of time established by the trade agreement as the period within which employees subject to its terms had to achieve such membership; that the Complainant had subsequently made a belated tender of his membership application and the required initiation fee; that the Respondent Union had, nevertheless, renewed its demand for his dismissal; and that the Respondent Company had, thereafter, effectuated the requested discharge. The course of conduct attributed to the Respondent Union and the Company was alleged to have involved unfair labor practices, on the part of each, within the meaning of Section 8 (a) (1) and (3), Section 8 (b) (1) (A) and (2), and Section 2 (6) and (7) of the Act, as amended.

Each respondent, in its answer, substantially con-

ceded the jurisdictional allegations of the Consolidated Complaint and certain factual allegations therein contained, but denied the commission of any unfair labor practices.

Pursuant to notice, a hearing was held before me, a duly designated Trial Examiner, at Los Angeles, California, on October 4 and 5, 1955. All of the parties were represented by counsel. They were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file briefs and proposed findings and conclusions. No testimonial evidence was offered however; the facts summarized elsewhere in this report have been established either by admissions or by a stipulation received in evidence. Upon a brief discussion of the issues involved—after the receipt of the stipulation—the hearing was closed. Briefs on behalf of the General Counsel and Respondent Union have, however, been received.

Upon the entire record in the case, I make the following findings of fact.

Findings of Fact

I. The Business of the Respondent Company

Technicolor Motion Picture Corporation, designated as the Respondent Company herein, is a corporation engaged in the processing of photographic film. It maintains its main office and place of business in the city of Los Angeles, California. In the course of its business, the Respondent Company performs services valued in excess of $1,000,000 an-

nually for motion picture producers who ship their product valued in excess of $300,000 to and through States of the Union other than the State of California.

Neither of the respondents has presented any substantial challenge to the jurisdictional allegations of the Consolidated Complaint. I find, therefore, that the Respondent Company is engaged in commerce within the meaning of the Act, as amended.

> (The respondents did not concede the General Counsel's original characterization of Technicolor as a Delaware corporation. Upon his subsequent motion to amend the Consolidated Complaint, and to describe it as a Maine corporation, they interposed no objection. But their answers were subsequently permitted to stand to the Consolidated Complaint as amended. In a strict sense, therefore, the revised allegation of the General Counsel with respect to the state of Technicolor's incorporation remained to be proved—and no evidence with respect to it was offered. The omission of proof with respect to the matter, however, cannot be considered fatal to the General Counsel's jurisdictional contention.)

In the light of the record, and in conformity with the Board's newly established policies in this regard — see Jonesboro Grain Drying Cooperative, 110 NLRB 481, 35 LRRM 1038, and related cases— I find, also, that the assertion of the Board's juris-

diction in this case is warranted to effectuate the objectives of the statute.

II. The Labor Organization Involved

Local 683 of the International Alliance of Theatrical State Employees and Moving Picture Machine Operators of the United States and Canada, AFL, is a labor organization within the meaning of Section 2 (5) of the Act, as amended, which admits employees of the Respondent Company to membership.

III. The Unfair Labor Practices

A. The Stipulated Facts

On or about July 31, 1954, the Respondent Company and the Union—by their respective officers, agents, and representatives—entered into a contract under which the Union was recognized as the exclusive bargaining representative of the Company's employees in certain listed classifications—including the classification of film technician—and under which every employee subject to the agreement was required to "be" and remain a member of the Union in good standing on and after the 30th day following the beginning of his first employment, or the effective date of the agreement, whichever was the later.

Hayden A. Balthrope, a film technician in the Respondent Company's employ and the Complainant herein, knew about the execution of the July 31st agreement, and the union-security clause it contained, shortly after its execution date—and in any event, I find, no later than September 7, 1954;

the parties have stipulated, for the record, that he was informed of the contract's execution by the management of the Respondent Company and that he had also gained knowledge of it from other sources.

> (Prior to the execution of the July 31st agreement between the Respondent Company and the Union, there had been no union-security provision in effect at the Respondent Company's plant. Balthrope, although employed by the Respondent Company for a number of years prior to the July 31st agreement, had never applied for membership in the Respondent Union and had never tendered an initiation fee to the organization.)

Despite his knowledge in this regard, however, the Complainant, I find, failed to apply for membership and join the Respondent Union within the period of time required under the union-security provision of the July 31st trade agreement. Upon his failure to join the Union, that organization prepared and dispatched a written demand on August 31, 1954, that Balthrope be discharged pursuant to the trade agreement. The demand read as follows:

> We wish to advise your firm that employee Hayden Balthrope has failed to become and remain a member of the Film Technicians of the Motion Picture and Television Industries, Local 683, I.A.T.S.E., after the thirtieth day following the execution of our current Collec-

tive Bargaining Agreement as is required by Article 3, Paragraph (2) thereof. The records of this Union show that this employee has not made application to join the Union nor has he tendered the regular dues or initiation fees as required within the time limits provided.

Based upon the failure of this employee to complete membership in this Union, we hereby give Technicolor Corporation written notice in accordance with the requirements of Article 3, Paragraph (b) of the demand of this Union for the discharge of this employee, and further notify you that Technicolor Corporation will be deemed to be in default of its contract unless such discharge is completed within a reasonable time not to exceed three days after the receipt of this letter.

Article 3 (b) of the trade agreement between the Respondent Company and the Union, referred to in the above letter, reads as follows:

> Within a reasonable time, but not to exceed 3 days, after receipt of written notice from the Union that any such employee is not a member as above required, the producer shall discharge any such employee, the producer shall not be in default unless it fails to act within said time after receipt of such notice.

Despite the receipt of the Union's demand, however, the Respondent Company refused to discharge Balthrope. On October 1, 1954, in a letter identical with that previously quoted except as to

date, the Union again demanded the discharge of the Complainant pursuant to its collective bargaining agreement with the respondent employer. The Respondent Company, however, took no action.

Numerous oral demands with respect to Balthrope's discharge were thereafter presented by the Respondent Union; the Company was specifically requested, I find, to comply with the terms of its trade agreement and to discharge the Complainant pursuant to the agreement's union-security clause.

On or about December 7, 1954, Balthrope made his initial application for membership in the Respondent Union and accompanied his application, I find, with a check for $250, the established initiation fee uniformly required by the Union of all prospective members.

> (By the stipulation previously noted, the parties have agreed that the Respondent Union's initiation fee, uniformly required, was the only sum which the Union asked or required the Complainant to deposit, in connection with his membership application. It is so found.)

The record is silent with respect to the Respondent Union's immediate reaction to Balthrope's application for membership, although the respondents have admitted that the Union "retained" his application and initiation fee. Its oral demands with respect to his discharge by the Respondent Company, under the terms of the collective bargaining agreement previously noted, appear to have been re-

peated, however, subsequent to its receipt of the membership application; the stipulation previously noted establishes that such demands were repeated until some date in January 1955. The Respondent Company, however, continued its "failure" to accede to these demands.

On or about January 27, 1955, Balthrope informed the Respondent Company, through its officers and agents, that he had paid his initiation fee and applied for membership in the respondent labor organization.

(This factual conclusion is based upon a Consolidated Complaint allegation admitted by the respondent employer. The Respondent Union's answer included a denial with respect to the allegation—based upon its lack of information with respect to the matter. Since the allegation's substantive content, however, dealt exclusively with a matter directly within the area of knowledge attributable to the Respondent Company and its management, their admission with respect to the allegation may certainly be considered sufficient to establish the facts. And I have so found.)

On February 7, 1955, the executive board of the Respondent Union approved the Complainant's application for membership. The record is silent with respect to the nature or extent of the Respondent Company's knowledge in regard to this decision by the Union's executive board. Its representatives, however, have advanced no claim of ignorance in regard to the organization's action.

Despite its admitted knowledge with respect to Balthrope's application for membership in the Respondent Union and his submission of the established initiation fee required by the organization, and its possible knowledge with respect to the Union's belated acceptance of his membership application, the Respondent Company finally discharged the Complainant on February 10, 1955.

In a letter dated and apparently dispatched on the same day, the Respondent Union notified Balthrope of the action of its executive board with respect to his membership application, subject to the "endorsement" of its parent international; he was advised that he would be notified as to the time and place of his induction into membership as soon as the parent international had approved his application.

> (Some months later, according to the Stipulation, Balthrope's membership application was, in fact, approved by the Respondent Union's parent organization.)

The Complainant was also advised that the facilities of the Respondent Union would be currently available, for the purpose of rendering all possible assistance to him in the procurement of employment, within the Respondent Union's jurisdiction, for which he might be qualified, and that, since he had been discharged by the Respondent Company for his "previous failure" to comply with the union-security provisions of a trade agreement, the Respondent Union had already undertaken to deter-

mine whether other "comparable" employment within the Union's jurisdiction was presently available to him. He was officially notified that an employment opportunity existed at Consolidated Film Laboratories for a printer-operator at a contractually-established $2.60 hourly rate; he was advised to "contact" the Respondent Union's secretary-treasurer at once to secure full details with respect to the indicated opportunity and other available employment, in order that he might be able to resume work immediately.

Balthrope responded on the 15th of February and reported that he had arranged to take the position open at Consolidated Film Laboratories, as set forth in the Union's letter, and to report there, for work, when he was available. He expressed his thanks to the Union, I find, for its assistance. The stipulation previously noted establishes that he has been employed at Consolidated Film Laboratories, under Union contract, continuously—from the date of his acceptance with respect to the "open" position to the date of the stipulation in the instant matter—at "comparable" wage rates.

B. Analysis and Conclusions

1. The Issues

The stipulation which the parties have chosen to submit presents for determination, despite its material abridgment, a case which appears to call for the application of the Board's recently enunciated policy with respect to the efficacy of a belated dues

tender under a valid union-security contract, or a reconsideration of that policy. Aluminum Workers International Union, Local No. 135, AFL (Metal Ware Corporation), 111 NLRB No. 63, 112 NLRB No. 80, 35 LRRM 1489, 36 LRRM 1077. In that case the Board declared that:

> The trial examiner, relying upon an earlier Board decision * * * Chisholm-Ryder Company, Inc., 94 NLRB 508 * * * in effect found that a belated tender does not forestall a valid discharge. However, we hold that a full and unqualified tender made any time prior to actual discharge, and without regard as to when the request for discharge may have been made, is a proper tender and the request is unlawful. Accordingly, as we have found that the Complainant herein tendered her back dues and reinstatement fee on November 6; that the Respondent thereafter refused to accept this tender; and that the Complainant was subsequently discharged pursuant to the Respondent's request on November 19, we hold without merit the fact that the Respondent had requested the discharge on October 27, and find that the Complainant, in making the maximum tender demanded by the Union, before her actual discharge, was protected against discharge based upon the Respondent's request.

To the extent that the agency's antecedent Chisholm-Ryder case, noted, might be considered inconsistent with the decision thus announced, it was expressly overruled.

In the instant case, the contention of the General Counsel with respect to the unfair labor practices attributed to the Respondent Company and the Union rests squarely upon the agency's pronouncement in the Aluminum Workers case, as quoted; his representative, indeed, expressly disclaims reliance upon any alternative theory. Under the rule established in the cited case, it is argued, the unfair labor practices described in the Consolidated Complaint were committed when the Complainant was discharged by the Respondent Company, at the Union's request, after a full and unqualified tender of his initiation fee had been "accepted" by the Union, to the knowledge of the firm.

The Respondent Union disputes this contention, upon a multiplicity of grounds. At the outset, it is argued that Aluminum Workers ought to be distinguished, since the Board's decision did not purport to qualify, in any way, the significance of the thirty-day grace period established for the achievement of membership in the respondent union therein, by non-member employees, under the union-security clause of the agreement there involved. The Respondent Union also argues, in this connection, that the situation now presented for consideration may be distinguished from that involved in the Aluminum Workers case by virtue of the fact that the stipulated record in the present matter reveals no independent evidence of a discriminatory motivation, attributable to either respondent, and, additionally, by the absence of independent

evidence of any interference, restraint, or coercion. Finally, the Union attempts to distinguish the cases on the ground that the present record contains no evidence that the Complainant has sustained any loss of wages or other benefits incidental to his employment. In the light of these contentions, it is argued that Aluminum Workers ought not to be considered decisive.

The Respondent Union then goes on to argue, however, that the doctrine of that case ought to be reconsidered, in any event, with respect to its applicability in cases of dues delinquency, and, also, with respect to its persuasive impact, if any, in cases involving a failure or refusal to submit a uniformly required initiation fee within particular time limits established under a valid union-security agreement. Its arguments in this connection appear to be bottomed upon the statute, its legislative history, agency precedent in other dues delinquency cases which did not involve special circumstances, and considerations of sound practice in the field of industrial relations.

Finally, in a logical sense, the Respondent Union contends that the Aluminum Workers doctrine ought not to be applied retroactively, in any event, to invalidate a discharge authorized under established Board decisions recognized as determinative when it took place.

2. Analysis

As in other cases presented for agency determination entirely on the basis of a stipulation the

absence of detail — and the silence of the record with respect to certain facts which appear to have been accorded great, if not crucial, significance in the relevant earlier cases—narrows our present task to the determination of a legal, rather than a factual, issue. To mark the limits of the issue, it may be worth while, at the outset, to indicate some of the considerations present in earlier cases which this one does not involve.

1. The General Counsel makes no contention in this case, and there is no evidence to establish that Balthrope had attempted to submit his application for membership in the Respondent Union, and his initiation fee, within the thirty-day grace period contractually established for such action, and that he was not, in fact, delinquent in these respects. Cf. Chisholm-Ryder Company, Inc., 94 NLRB 508, 509. See also Aluminum Workers International Union, Local No. 135, AFL, supra; Pen and Pencil Workers Union, Local 19593, AFL, 91 NLRB 883, 885, in which the Board held the respondent unions guilty of an unfair labor practice because they requested the discharge of specific employees after rejecting their attempted tender of dues or initiation fees within the grace period specified under a valid union-security contract. And cf. Great Atlantic and Pacific Tea Company, 110 NLRB 918, 923-924; Ferro Stamping and Manufacturing Company, 93 NLRB 1459, 1461-1462; Electric Auto-Lite Company, 92 NLRB 1073, enf'd 96 F. 2d 500.

2. Nor is there any contention, or evidence, tending to show that the Respondent Union ever gave

the Complainant cause to believe that a timely tender of his application and the regularly established initiation fee would be futile. Cf. N. L. R. B. v. Local 3, Bloomingdale, District 65, Retail, Wholesale and Department Store Union, CIO, 216 F. 2d 285, 35 LRRM 2043, 2045, setting aside 107 NLRB 191; Krambo Food Stores, Inc., 106 NLRB 870, 876. Air Reduction Company, Inc., 103 NLRB 64, 66.

3. No contention is made that Balthrope ought not to be considered bound by the union-security provisions of the contract executed by the respondents, on the basis of evidence that he had no actual knowledge of its existence. Cf. Air Reduction Company, Inc., 103 NLRB 64.

4. There is no contention or evidence that the Complainant's discharge was demanded or effectuated without regard to a valid and currently effective waiver, by the respondent labor organization, of his obligation to apply for Union membership and submit an initiation fee prior to some predetermined date, under the trade agreement between the respondents herein involved. Cf. Chisholm-Ryder Company, Inc., supra, IR at p. 522.

5. No contention is made, and there is no evidence, that the Union, absent a formal waiver, nevertheless acquiesced in Balthrope's failure to submit an application for Union membership within the contractually-established thirty-day grace period, and his failure to make a timely tender of the required initiation fee.

6. The General Counsel has presented no evidence that the tender which Balthrope finally made was inadequate, and makes no contention that it should have been accepted by the Union, nevertheless—or that its earlier demand for his discharge should have been withdrawn—because of any antecedent misrepresentation on its part, or its failure to make clear the elements of an adequate tender. Cf. Aluminum Workers International Union, Local No. 135, AFL, supra; Busch Kredit Jewelry Company, Inc., 108 NLRB 1214, 1215.

7. There is no contention or evidence in this case that the Respondent Union failed or refused to make Union membership available to Balthrope on the terms and conditions generally applicable to other employees, or that the Union requested his discharge for some reason other than his failure to submit a membership application and the sum uniformly required as an initiation fee. Cf. Kuner-Empson Company, 106 NLRB 670, 673-674; National Lead Company, 106 NLRB 545, 547; Al Massera, Inc., 101 NLRB 837, 839; North American Refractories Company, 100 NLRB 1151, 1154-1155; Food Machinery and Chemical Corporation, 1430, 1432-1433; Kaiser Aluminum and Chemical Corporation, 98 NLRB 753, 754-756; Standard Brands, Inc., 97 NLRB 737, 739-740; Chisholm-Ryder Company, Inc., supra, IR at p. 522-523; Ferro Stamping and Manufacturing Company, 93 NLRB 1459, 1463; Firestone Tire and Rubber Company, 93 NLRB 981, 982. See also Biscuit and Cracker Workers Local Union No. 405, AFL, 109

NLRB 985; Victor Metal Products Corp., 106 NLRB 1361; Kingston Cake Company, 97 NLRB 1445; Eclipse Lumber Company, Inc., 95 NLRB 404 enf'd 199 F. 2d 684 and other cases too numerous to cite.

8. Nor is there any contention, in this case, that Balthrope's tender of the Union's required initiation fee antedated or preceded the organization's "final adjudication" of his delinquency; no contention is made, either, that the Complainant's delinquency was arbitrarily or capriciously determined pursuant to an adjudication deficient in procedural due process. Cf. Chisholm-Ryder Company, Inc., supra, dissent at p. 514.

No special considerations are urged in behalf of the Respondent Company or the Union, by way of defense. Specifically, the Union has made no attempt to rest upon Balthrope's apparent failure to protest its initial demands, with respect to his discharge, as evidence of his acquiescence in the matter, nor has the Respondent Company advanced any claim, under the 8 (a) (3) proviso, that it lacked knowledge with respect to the existence of a motivation for the Union's discharge demand aside from Balthrope's obvious delinquency under the union-security clause of its trade agreement.

May a union, then, privy to a contract with a valid union-security clause insist upon the discharge of an employee who fails to make a timely effort to meet his contractual obligation under the clause, with respect to the submission of a union

membership application and the tender of an initiation fee, despite his delated attempt to satisfy the union, and may an employer, fully cognizant of the situation, discharge the employee upon the union's reiterated demand, without liability under the statute?

With respect to this issue, the Board's decision in the Aluminum Workers case would seem, at first reading, to be determinative. The Respondent Union, however, makes much of the fact that the case involved a long-time union member who became a dues delinquent; the instant case, it is argued, involves the failure of a non-union employee to make a timely tender of the initiation fee uniformly required of such employees, under a valid union-security provision fulfilling all of the statutory requirements. The Union also points out that the Aluminum Workers employee had made an effort, shortly after her delinquency materialized, to tender all of the back dues and current dues for which she was obligated, and that the union's initial demand for her discharge had followed its rejection of that tender; upon a further tender which included the dues in question and a reinstatement fee belatedly demanded after an initial request for the discharge of the employee involved, the union in Aluminum Workers continued, nevertheless, to demand her dismissal. In this case, it is argued, the Union's demand with respect to the application of its union-security contract was prompt, and did not follow the rejection of an initial tender; Balthrope's belated attempt to apply for Union membership

and to submit his initiation fee followed—by several months—the organization's initial demand for his discharge. Upon consideration, I am persuaded that the distinction between the factual situation now before me and that involved in the cited case, as set forth, must be considered more than nominal, and that the contentions of the Respondent Union in this connection have merit.

The doctrine of the Aluminum Workers case, upon which the General Counsel relies, is stated, truly, in sweeping terms. The agency, in its decision, did refer to a "full and unqualified tender" made any time prior to actual discharge, without distinction as to whether such a tender related to a union's periodic dues or an initiation fee. The case, however, admittedly involved a dues-delinquent union member, rather than a non-member guilty of an omission with respect to the very first step required of him under a valid union-security clause. This factual difference cannot be dismissed as insignificant. Under certain circumstances, it is true, the distinction in question might well be characterized as a distinction without a difference. In the light of the specific language of the statute, however, such a disposition of the Union's contention is not, in my opinion, warranted. Agreements which require membership in a labor organization as a condition of employment "on or after the thirtieth day" subsequent to the inception of such employment or the agreement's effective date, whichever is the later, are specifically permitted under the Act as amended; the statute is silent

and subject to interpretation, however, with respect to the permitted scope of any contractual arrangements in regard to the retention of membership once acquired.

> (Except for an indirect acknowledgment that "periodic" dues may be required as a condition precedent to the retention of membership, the statute provides no specific guide with respect to the terms and conditions under which a union-security clause may be enforced against dues-delinquent members.)

In cases too numerous to cite, under the generalized mandate of the statute, this agency has had occasion to express its judgment with respect to the existence or non-existence of special circumstances sufficient to warrant the imposition of a statutory sanction against the enforcement of a valid union-security clause against dues-delinquent union members, to prevent discrimination and otherwise to effectuate the statutory objectives. With respect to initiation fees, however, the statute would seem to be explicit and leave no room for equitable interpretation; their submission may be required, under a valid trade agreement, on or after the thirtieth day subsequent to the inception of employment or the effective date of the agreement, whichever is the later. Agreements couched in such terms, therefore, would certainly seem to be enforceable as written. And in the absence of special circumstances comparable to those dealt with in the dues delinquency cases, I find the General Counsel's assump-

tion that the Board's pronouncement in such a case ought to be taken as stare decisis, at this stage, in a matter involving a delinquent initiation fee, unwarranted.

The distinction noted, however — while it may dispose of any contention that the Board's pronouncement ought to be determinative—cannot be said to dispose of the Aluminum Workers doctrine. If not determinative, should it nevertheless be considered persuasive? The General Counsel, presumably, would so contend. I find merit, however, in the Respondent's array of argument to the contrary.

As previously noted, the statute—despite its failure to make a specific provision with respect to the circumstances under which periodic dues uniformly required as a condition precedent to the retention of membership, may legitimately be considered delinquent under a valid union-security clause — clearly provides that the acquisition of membership, or at least the tender of an initiation fee, may contractually be required, as a condition of employment, on or after the thirtieth day of a grace period, as indicated. And if the Act as amended were, in any respect, ambiguous in this connection, all doubt would be removed, in my opinion, by a consideration of its legislative history. With reference to the union-security provisions of the Senate bill, which the Congressional conferees later adopted in material part, the Senate Committee majority initially stated that:

> * * * employers would still be permitted to enter into agreements requiring all the employees in a given bargaining unit to become members 30 days after being hired * * * (Emphasis supplied) * * *

And the Conference Report on the legislation, after its citation of the fact that Section 8 (d) (4) of the House bill (HR 3020, 80th Cong., 1st Sess. 1947) had permitted the union shop and maintenance of membership, went on to characterize the conference agreement as an adoption of the Senate amendment, with respect to the union shop, under the 8 (a) (3) proviso. In this connection it was pointed out that:

> * * * an employer [under the provisions of the conference agreement] is permitted to enter into an agreement with a labor organization * * * whereby the employer agrees that he will employ only employees who on and after thirty days from the date of their employment (or from the date of the agreement, if that is later) are members of the labor organization concerned * * * (Emphasis supplied) * * *

For these remarks, in context, see Senate Report No. 105, 80th Cong., 1st Sess. (1947), 7; House Conference Report No. 510, 80th Cong., 1st Sess. (1947), 41. The conclusions clearly implicit in the Conference Report's quoted language had, in fact, been given concrete expression in the original House Report on its bill. Several explicit references appear, in that report, to the imperative char-

acter of the union-security arrangements permitted under the bill. The House Report contained a reference, for example, to agreements "requiring" employees to become and remain union members a month or more after the inception of their employment or the execution of the agreement; it indicated that, under such permitted contracts, employees would have "thirty days to decide" whether or not to join a union; and it pointed out that unions, under the bill, might "require" employers to discharge employees for the non-payment of their initiation fees. House Report No. 245, 80th Cong., 1st Sess., pp. 9, 34 (Emphasis supplied).

A conclusion that the statute was intended to give unions the right to insist upon the timely submission of uniformly required initiation fees finds additional support in the legislative debates. Senator Taft, for example, declared, during the Senate debate with respect to the provisions of the bill in regard to the closed or union shop (93 Congressional Record 3952) that:

> They do not abolish the union shop * * * a union shop is defined as a shop in which the employer binds himself not to continue anyone in employment after the first 30 days unless he joins the union. In other words an employer may employ anyone whom he chooses to employ, but after 30 days such employee has to join the union or else the employer can no longer employ him. (Emphasis supplied)

The Senator went on to point out that, under the

Senate bill, no one could get a "free ride" in a union shop. And Senator Smith of New Jersey, with respect to the same problem, pointed out that an employee in a union shop "must join" the union, under the bill, within 30 days after his employment. (93 Congressional Record 4412-4413). The permissive sweep of the bill in this connection was subsequently reaffirmed by Senator Taft in identical language. (93 Congressional Record 5087.) In connection with his remarks, the Senator also declared that:

> We further provide in the bill that if a man is fired by the union for some reason other than non-payment of dues, the employer does not have to discharge him. The abuse at which that provision is aimed is the usual type of abuse and that is the only type of abuse testified to. We have taken care of that in the committee bill. (Emphasis supplied)

In response to certain objections voiced by Senator Donnell, Senator Taft again distinguished the union shop from the closed shop and pointed out that, under the former:

> * * * a man can get a job without joining the union or asking favors of the union and once he has the job he can continue in it for 30 days * * * (Emphasis supplied) * * *

After further colloquy and a reiteration of his objections to the union shop, as thus expounded, Senator Donnell summarized his views as follows:

> Mr. President, the word "must" is the word which I think is decisive. It means that there is no longer a freedom of choice on the part of the employee. The provision that there may be a contract by which an employer will contract that he will not engage anyone unless the individual joins a union within 30 days after the engagement is subject, in my judgment, to exactly the same logical objection as is the provision in the contract that he will not hire a man unless he first belongs to a union * * * yet he [the employee] is confronted, under the bill as it exists with the provision that he cannot retain a job after he once gets its unless he joins an organization within 30 days. He may not want to join the organization * * * but the word "must", which the distinguished Senator from Minnesota has used, applies nevertheless with respect to him. It is compulsion * * * in that he must join the organization within 30 days. (Emphasis supplied)

Senator Donnell's interpretation of the bill, as set forth, was never challenged as inaccurate. (93 Congressional Record 5087-5091.)

The statute and its legislative history, in my opinion, disclose a clear intent on the part of Congress to permit the discharge of an employee who fails to join a union—that is, one who fails to make a tender of the initiation fees uniformly required by such an organization—within the required grace period of thirty days or more provided by a valid union-security contract of the type contemplated

by the statute. Any contention with respect to the allegedly unlawful character of such a discharge in the face of a belated tender, except in special circumstances, would clearly be contrary to the legislative mandate. And I so find.

This agency has already been judicially admonished that the obligations of a contract expressly authorized by statute may not be impaired by an administrative exception or modification, regardless of policy considerations. In the Colgate-Palmolive-Peet case the United States Supreme Court, confronted with a question as to the validity of a Board-imposed limitation upon the enforceability of the closed shop contracts permitted under the Wagner Act's 8 (3) proviso, declared that:

> It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy, which would make an unfair labor practice out of that which is authorized by the Act. The Board cannot ignore the plain provisions of a valid contract made in accordance with the letter and the spirit of the statute and reform it to conform to the Board's idea of correct policy. To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress. Colgate-Palmolive-Peet v. N. L. R. B., 338 U. S. 355, 25 LRRM 2095, 2098-2099.

Whatever freedom of statutory interpretation may

be available to the Board, then, in regard to the applicability of the 8 (a) (3) proviso and Section 8 (b) (2) in cases involving the efficacy of a belated tender to forestall discharge in cases of delinquency with respect to the periodic dues uniformly required by a union, the quoted language of the Court would seem to suggest, if not compel, a conclusion that similar freedom ought not to be exercised in a case involving delinquency in the tender of an initiation fee. With respect to the initiation of union membership—or the satisfaction of a contractually established obligation in regard to the submission of initiation fees—the statute, in short, clearly permits agreements making time of the essence. Under the circumstances, therefore, I find the General Counsel's contention, now advanced, that the 8 (a) (3) proviso and Section 8 (b) (2) permit employees hired under a valid union-security agreement to disregard, with impunity, its uniformly applicable requirements with respect to the timely payment of initiation fees, insupportable as a distortion of the manifest sense of the statute.

Even if it could be maintained, persuasively, that the Act, as amended, provides no clear expression of congressional intent to permit the rejection, by a union, of a belated tender involving a regularly established and uniformly required initiation fee, sound practice in the field of industrial relations would seem to suggest the advisability of recognition by this agency, of the union's right to take such a stand.

It is well established, as a matter of contract law,

that a tender—to be effectual—must be made within the time fixed by law or contract, as the case may be. Williston on Contracts, VI, Section 1810. It is, of course, equally true—as the dissent in the Chisholm-Ryder case pointed out—that valid tenders may also be made subsequent to a contract's maturity date, except where the time of performance is expressly designated or goes to the essence of the agreement involved. Williston on Contracts, supra; Restatement of Contracts §276. As previously noted, however, the exceptional situation is precisely the one presented for determination. The language of the trade agreement between the respondents in this case sets forth, in terms, the limits of the grace period they have agreed upon as the period within which Union membership must be acquired by employees within the contract unit.

In cases too numerous to cite, also, arbitrators charged with the interpretation of union-security agreements have approved discharges, at the request of the union involved, affecting employees delinquent in the submission of initiation fees or periodic dues. In only a few of these cases, however, have the arbitrators had to consider the significance of a belated tender, prior to discharge, by the employees affected. Almost without exception, they have recognized the right of the union involved to reject such belated tenders. Shell Oil Company, 14 LA 143, 146; Title Guarantee and Trust Company, 10 LA 662, 663; Strauss Stores Corporation, 8 LA 117, 119-121. In the Title Guar-

antee case, indeed, the arbitrator went so far as to declare that:

> The fact that dues payments were proffered after the employer had been requested to discharge Miss Wade cannot adversely affect the determination to sustain the union's request, for such proffer is nothing more or less than the plea of an employee who has been discharged after several warnings concerning his derelictions, that he will seek to amend his ways. Such plea cannot have any effect upon the justness of the cause for discharge.

While a study of the professional literature in the field of industrial relations, available to me, has provided no reliable clue as to the conclusions with respect to sound policy or practice which "expertise" might warrant in this connection, the arbitration cases certainly suggest a consensus that decisions favorable to belated tenders would materially detract from the substance of union-security agreements and leave individual employees free to ignore an important membership condition, which unions are permitted to impose.

In effect, as the Respondent Union points out, it is the General Counsel's contention that the unexplained failure of the Respondent Company to discharge Balthrope, within a three day period after its receipt of the Union's August 31st notice, or within a three day period after its receipt of the Union's October 1st notice, effectively extended the thirty day grace period established by the con-

tract, in his case, even though he may have had personal notice with respect to the contract's requirements, in regard to union membership as a condition of employment, shortly after its execution.

> (Despite his admitted knowledge with respect to the agreement's execution, it may be noted, Balthrope permitted at least four months to elapse before making any effort to tender his initiation fee. No explanation for the delay was ever offered.)

I find no discretion vested in this agency, by the statute, to impose a rule of conduct on employers and unions reasonably calculated to facilitate such a result.

The application of the General Counsel's theory in the present case also, even if permitted, would not—in my opinion—effectuate the legislative intent, previously noted, with respect to agreements establishing a limited form of union security in order to promote industrial stability. At most, it might establish a precedent under which valid and legal union-security agreements could be rendered nugatory and unenforceable, in practice, by the unilateral decision of the employers involved to delay compliance with their terms. At the least, it would permit the unilateral extension, by employers, of contractually established deadlines for the tender of uniformly required initiation fees by the non-union employees in a contract unit.

In the light of my consideration of the statute

and its legislative history, in short, I have not been persuaded that such a limitation upon the rights of employers and unions to enforce union-security agreements may be imposed by this agency, at least in cases involving delinquent initiation fees. And in the light of the information I have been able to glean by research, with respect to the usual practices of employers and unions in the administration of union-security contracts, and the applicable policy considerations, I am not persuaded that such a construction of the statute would be calculated to effectuate the statutory objectives even if permissible.

> (There may also be a serious question, in the light of these considerations, as to the rule which this agency ought to apply in cases involving a belated tender to forestall a discharge for dues delinquency. The problem, however—which would necessarily involve a reconsideration of the Board's pronouncement in the Aluminum Workers case, and a policy decision—is not presented in this case.)

It is clear, upon the entire record, that Balthrope failed to meet his obligation, under the trade agreement in effect at his place of employment, with respect to the submission of the initiation fee required by the Respondent Union, within the grace period therein specified. As a delinquent employee, in this respect, he was vulnerable to discharge. And his belated tender of the sum required, I find, may not—for reasons which I have already discussed—

be considered a bar to his dismissal, under the statute. I find that the respondents committed no unfair labor practice in connection with Balthrope's discharge, pursuant to the requirements of their union-security agreement.

(In the light of my disposition of the case, as noted, I have found it unnecessary to consider the further contention of the Respondent Union that the record reveals no discriminatory motive for Balthrope's discharge, and the contention that it contains no independent evidence of interference, restraint or coercion directed to the respondent firm's employees. Cf. Radio Officers Union, AFL, v. N. L. R. B., et al., 347 U. S. 17, 33 LRRM 2417, 2427-2431; American Newspaper Publishers Association v. N. L. R. B., 193 F. 2d 782, 29 LRRM 2230, 2244. Nor has it been necessary for me to consider the Union's contention that the Complainant did not, in fact suffer any loss of wages or other benefits. The respondent labor organization also contended that the Aluminum Workers doctrine, even if applicable, ought not to be applied retroactively to invalidate a discharge permissible under the decisional doctrine recognized as valid when it took place. Cf. N. L. R. B. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al., 225 F. 2d 343, 36 LRRM 2632, 2635; N. L. R. B. v. Guy F. Atkinson Company, 195 F. 2d 141, 29 LRRM 2518 ff. Since I have found the basic conten-

tion of the General Counsel unacceptable, as a matter of law, I find it unnecessary to consider this aspect of the Union's defense.)

Upon the entire record, then, and in the light of these considerations, it is my opinion that the Consolidated Complaint in this case should be dismissed in its entirety, and I shall so recommend.

(The Respondent Union has submitted certain proposed findings and conclusions. They appear, in the main, to be compatible with those set forth in this report. I consider the organization's proposed findings of fact acceptable, with the exception of Finding No. 5 which is not entirely sustained by the stipulated record. Its proposed conclusions of law are accepted in their entirety.)

Conclusions of Law

Upon the foregoing findings of fact, and upon the entire record in the case, I make the following conclusions of law:

1. The Respondent Company, Technicolor Motion Picture Corporation, is an employer within the meaning of Section 2 (2) of the Act, engaged in commerce and business activities which affect commerce within the meaning of Section 2 (6) and (7) of the Act, as amended.

2. The Respondent Union, Local 683 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL, is a labor organi-

zation within the meaning of Section 2 (5) of the Act, as amended.

3. The Respondent Company has not engaged in unfair labor practices, as alleged in the Consolidated Complaint, within the meaning of Section 8 (a) (1) and (3) of the Act, as amended.

4. The Respondent Union has not engaged in unfair labor practices, as alleged in the Consolidated Complaint, within the meaning of Section 8 (b) (1) (A) and (2) of the Act, as amended.

Recommendation

Upon these findings of fact and conclusions of law, and upon the entire record in the case, I recommend that the Consolidated Complaint in this case, as amended, be dismissed in its entirety.

Dated this 17th day of November, 1955.

/s/ MAURICE M. MILLER,
Trial Examiner

Affidavit of Service by Mail and Postal Return Receipts Attached.

United States of America
Before the National Labor Relations Board

Case No. 21-CA-2172

TECHNICOLOR MOTION PICTURE CORPORATION and HAYDEN A. BALTHROPE, An Individual

Case No. 21-CB-698

LOCAL 683 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, AFL-CIO, and HAYDEN A. BALTHROPE, An Individual

DECISION AND ORDER

On November 17, 1955, Trial Examiner Maurice M. Miller issued his Intermediate Report in the above-entitled consolidated proceeding, recommending that the complaint be dismissed in its entirety as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief. The Respondent Union filed a brief in support of the Trial Examiner's recommendations.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the In-

termediate Report, the exceptions and the briefs, and the entire record in this case, and hereby adopts only the factual findings of the Trial Examiner.

I. The Unfair Labor Practices

The unfair labor practices herein concern the belated payment of an initiation fee by Hayden A. Balthrope, an employee of the Respondent Technicolor Motion Picture Corporation, herein called Technicolor, under the following circumstances:

Pursuant to a valid union security agreement dated July 31, 1954, the Respondent International Alliance of Theatrical Stage Employees, herein called IATSE, made a demand in writing on August 31, 1954, that Technicolor discharge Balthrope for failure to attain and maintain membership in IATSE.[1] Technicolor failed to act in accordance with IATSE's demand and, therefore, on October 1, 1954, IATSE made a second written demand upon Technicolor, which was also apparently ignored. Following this, and up to the day of Balthrope's discharge, IATSE's representatives made frequent oral demands for Balthrope's discharge. Finally, on December 7, 1954, Balthrope gave to IATSE his application for membership together with the uniformly required initiation fee, which IATSE accepted subject to the approval of its membership

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[1] No direct demand was made by IATSE upon Balthrope. However, it is conceded that Balthrope was made aware of the union shop agreement and of his obligations thereunder.

committee. On January 27, 1955, Balthrope informed Technicolor of his application and payment of initiation fee, but despite this, and pursuant to IATSE's persistent demands, Technicolor discharged Balthrope on February 10, 1955, the same day that IATSE informed Balthrope that his membership application had been accepted.

For reasons appearing in the Intermediate Report, the Trial Examiner found the Board holding in the Aluminum Workers case [2] is not applicable to a case like the instant one involving delinquent initiation fees, and that the belated payment of the initiation fee by Balthrope could not serve as a defense to his discharge under the union security agreement. He found, accordingly, that the discharge of Balthrope was not violative of the Act and dismissed the complaint. We do not agree.

In the Aluminum Workers case an employee was discharged under a union security agreement after having tendered all of his delinquent dues. In finding that the discharge was unlawful we held that, "* * * a full and unqualified tender made any time prior to actual discharge, and without regard as to when the request for discharge was made, is a proper tender and a subsequent discharge based upon the request is unlawful." [3] This holding is grounded on the Congressional view that union shop agreements may be utilized only to compel

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[2] Aluminum Workers International Union, 111 NLRB 411, 112 NLRB 619, enf'd C. A. 7, March 2, 1956, 37 LRRM 2640.

[3] Supra, at p. 621.

the payment of dues and initiation fees so as to prevent "free riders,"[4] i.e., employees who accept the benefits of union representation but who refuse to pay their allotted share therefor.

We are of the opinion that the principle enunciated in the Aluminum Workers case is applicable to the particular facts herein. Thus, before his discharge and pursuant to a continuing demand by IATSE, Balthrope paid the uniformly required initiation fee which IATSE accepted. This sum satisfied completely all of the financial demands made by IATSE[5] and, consequently, in these circumstances, from the moment of payment Balthrope could no longer be deemed a "free rider." We find, contrary to the Trial Examiner, that the discharge of Balthrope after he made this payment cannot be defended under the union shop agreement. The question as to whether he should be required to pay or tender, in addition to initiation fees, dues that would have been payable if had he joined the union when first asked, is not raised because there was no demand for such dues.

Accordingly, we find that by discharging Balthrope after he paid his initiation fee Technicolor violated Section 8 (a) (3) and (1) of the Act and that by causing Technicolor to so discharge Bal-

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[4] Radio Officers Union against N. L. R. B., 347 U. S. 17, 40-41; Union Starch and Refining Co. against N. L. R. B., 186 F. 2d 1008, 1011-1013 (C. A. 7), certiorari denied 342 U. S. 815.

[5] IATSE demanded no more than the payment of the initiation fee, which was paid and accepted.

thrope IATSE violated Section 8 (b) (1) (A) and (2) of the Act.

II. The Effect of the Unfair Labor Practice Upon Commerce

The activities of the Respondent set forth in Section I, above, occurring in connection with the operations of the Respondent Technicolor described in Section I of the Intermediate Report, attached hereto, have a close, intimate and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

III. The Remedy

Having found that the Respondents have engaged in unfair labor practices, we shall order them to cease and desist from this and like and related conduct and take certain affirmative action designed to effectuate the policies of the Act. Since it has been found that the Respondent Technicolor has unlawfully discharged and refused to reinstate Hayden A. Balthrope at the behest and insistence of the Respondent IATSE, we will order Technicolor to offer full reinstatement to Hayden A. Balthrope to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges, and we shall further order that the Respondents jointly and severally make whole the said Hayden A. Balthrope for any loss of pay he may have suffered as a result of the

discrimination against him.[6] Such back pay shall begin on February 10, 1955, and continue to the date of his reinstatement, or the date on which reinstatement is offered to him, except that, in accordance with our practice, the period from the date of the Intermediate Report to the date of the Order herein will be excluded in computing the amount of back pay to which Balthrope is entitled from the Respondents, because of the Trial Examiner's recommendation that the complaint be dismissed. Consistent with the policy of the Board enunciated in F. W. Woolworth Co.,[7] it will be ordered that loss of pay be computed on the basis of each separate calendar quarter or portion thereof during the appropriate back pay period.

The quarterly periods shall begin with the first day of January, April, July and October. Loss of pay shall be determined by deducting from a sum equal to that which Balthrope would normally have earned for each quarter or portion thereof, his net earnings, if any, in other employment during that period. The Regional Director is hereby directed to take all reasonable measures to assure that the back pay liability is borne equally by Respondent

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[6] Although the record shows that IATSE obtained immediate employment for Balthrope at a wage equal to that which he was receiving from Technicolor at the date of discharge, we order back pay because it is not clear that Balthrope did not at some time suffer pay loss by reason of the unlawful discharge.

[7] 90 NLRB 289.

Technicolor on the one hand and Respondent IATSE on the other.

It will be ordered, further, that the Respondent IATSE notify the Respondent Technicolor, in writing, that it has no objection to the employment of Balthrope as recommended herein. IATSE shall not be liable for any back pay accruing after five (5) days from the date such notice is given. Absent such notification, IATSE shall remain jointly and severally liable with Technicolor for all the back pay that may accrue.

IV. Conclusions of Law

In addition to the Conclusions of Law Nos. 1 and 2 as set forth in the Intermediate Report annexed hereto, the Board makes the following conclusions:

3. The Respondent, Technicolor Motion Picture Corporation, has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) and (1) of the Act.

4. The Respondent Union, Local 683 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (2) and 8 (b) (1) (A) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Order

Upon the entire record in the case and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

1. The Respondent, Technicolor Motion Picture Corporation, Hollywood, California, its officers, agents, successors, and assigns, shall:

A. Cease and desist from:

(1) Encouraging membership in Local 683 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, or in any other labor organization of its employees, by discharging any of its employees or discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of their employment;

(2) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

B. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(1) Offer to Hayden A. Balthrope immediate and full reinstatement to his former or substantially equivalent position without prejudice to his seniority or other rights and privileges;

(2) Upon request, make available to the Board or its agents, for examination and copying, all pertinent records necessary to analyze the amount of back pay under the terms of this Order;

(3) Post at its plant in Hollywood, California, copies of the notice attached hereto marked "Appendix A."[8] Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by the Respondent Company's representatives, be posted by it immediately upon receipt thereof and be maintained by it for at least sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Company to insure that said notices are not altered, defaced, or covered by any other material;

(4) Notify the Regional Director for the Twenty-first Region in writing, within ten (10) days from

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[8] In the event this Order is enforced by decree of a United States Court of Appeals, there shall be inserted before the words "A Decision and Order" the words, "A Decree of the United States Court of Appeals, Enforcing an Order."

the date of this Order, what steps it has taken to comply therewith.

II. Respondent Union, Local 683 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, Hollywood, California, and its officers, representatives, agents, successors, and assigns, shall:

A. Cease and desist from:

(1) In any manner causing or attempting to cause Technicolor Motion Picture Corporation, its officers, agents, successors, and assigns, to discriminate against its employees in violation of Section 8 (a) (3) of the Act;

(2) In any other manner restraining or coercing employees of Technicolor Motion Picture Corporation in the exercise of their rights to engage in or to refrain from engaging in concerted activities, as guaranteed them by Section 7 of the Act, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

B. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(1) Notify Technicolor Motion Picture Corporation, in writing, that it has no objection to Balthrope's employment and request Technicolor to offer him immediate and full reinstatement to his

former or substantially equivalent position without prejudice to his seniority and other rights and privileges;

(2) Post immediately in conspicuous places in its business office and wherever notices to its members are customarily posted, copies of the notice attached hereto marked "Appendix B."[9] Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by an official representative of Respondent Union, be posted by it immediately upon receipt thereof and be maintained for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Union to insure that said notices are not altered, defaced, or covered by any other material;

(3) Mail to the Regional Director for the Twenty-first Region signed copies of the notice attached hereto as "Appendix B" for posting, the Respondent Technicolor willing, at its Hollywood, California plant, and in places where notices to its employees are customarily posted. Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being signed as provided in the preceding paragraph of this Order be forthwith returned to the aforesaid Regional Director for posting;

(4) Notify the Regional Director for the Twenty-

[9] See footnote 8, supra.

fourth Region in writing, within ten (10) days from the date of this Order, what steps it has taken to comply herewith.

III. The Respondent, Technicolor Motion Picture Corporation, its officers, agents, successors and assigns, and Local 683 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, shall jointly and severally make whole Hayden A. Balthrope for any loss of pay he may have suffered because of the discrimination against him in the manner set forth in "The Remedy" section of the Decision herein.

Dated, Washington, D. C., June 21, 1956.

[Seal] BOYD LEEDOM, Chairman
ABE MURDOCK, Member
PHILIP RAY RODGERS, Member
National Labor Relations Board

Ivar H. Peterson and Stephen S. Bean, Members, dissenting:

We do not agree with the majority's reversal of the Trial Examiner's finding that there was no violation of the Act in the discharge of Balthrope under the terms of the admittedly lawful union-security agreement. It is clear that Balthrope knowingly and wilfully breached that clause of the contract which specifically required that he join IATSE 30 days after the contract became effective. Indeed, for a period of approximately 4 months he deliberately refused to pay the uniformly re-

quired initiation fee which would have given him the union membership required by the contract. Proper requests for his discharge under the contract had been timely made by IATSE, which Technicolor failed to honor until shortly after Balthrope belatedly tendered the initiation fee which IATSE accepted.

The majority excuses Balthrope's breach of the agreement and converts his discharge into an unfair labor practice by holding, under the principle of the Aluminum Workers [10] case, that Balthrope's belated payment of his initiation fee immunized him against subsequent discharge. However, the cited case involved a full tender of delinquent dues (which accrued after membership was timely acquired) prior to actual discharge, and we find no warrant for extending that holding to the instant case involving the delinquent payment of initiation fees. In his Intermediate Report, the Trial Examiner has made a careful analysis of the legislative history, the literal language of the Act, and the contract. He properly concluded, in our opinion, that with regard to the payment of initiation fees, unlike dues, time is of the essence and, therefore, an employee who fails to tender timely his initiation fee in accordance with the terms of a lawful union-security agreement may be lawfully discharged notwithstanding a prior belated tender.

In equating the payment of initiation fees to the

[10] Aluminum Workers International Union, 111 NLRB 411; 112 NLRB 619; enforced C. A. 7, March 2, 1956, 37 LRRM 2640.

payment of dues under the "free rider" concept, the majority apparently recognizes but fails to come to grips with a fundamental distinction between initiation fees and dues. Under a union shop clause, like the one here involved, an employee has the successive contractual obligations of first acquiring and then retaining membership; the payment of initiation fees is the price of acquiring membership while the payment of dues is the price of retaining it. The obligation to pay dues does not normally accrue until after membership has been acquired. Consequently, if belated payments of initiation fees at any time prior to discharge are regarded as timely, then an employee is permitted to profit by his own dereliction at the expense of the Union by being relieved of payment of the periodic dues which would have accrued had he timely paid his initiation fee. On the other hand, as in the Aluminum Workers case, an employee who has timely paid his initiation fee and is delinquent only in his dues, causes a union no monetary loss by a belated tender of all his outstanding dues. Balthrope escaped the payment of four months' dues by his belated tender of initiation fee and to that extent he was a "free rider" on the day of his discharge.

Finally, it would appear that the majority, by relying heavily on the fact that IATSE accepted Balthrope's belated tender of the initiation fee, is not certain that the Aluminum Workers case is here controlling. For, the burden of the holding in that case is that a full and unqualified tender of

delinquent dues made prior to actual discharge is sufficient, per se, to render the discharge unlawful and that it is immaterial whether or not the union accepted it. Therefore, since the majority, instead of finding that the belated payment of the initiation fee satisfied Balthrope's contractual financial obligation, merely finds that such payment "satisfied completely all of the financial demands made by IATSE," it would appear that the majority is also relying upon some unarticulated waiver theory. We submit, however, that there is no waiver issue in this case,[11] nor is there any basis for inferring from the stipulated and meager record that by accepting Balthrope's belated initiation fee, IATSE was waiving its pre-existing right to have him discharged under the terms of the union-security clause. Indeed, the fact that IATSE renewed its original demand for Balthrope's discharge after he belatedly paid his initiation fee seems to negate the concept that IATSE was waiving his past delinquency. Nor was the acceptance of Balthrope's

[11] In his brief to the Board the General Counsel states at p. 6: The issue is simply whether as a matter of law a person may be discharged at the request of a union for his failure to pay his initiation fees, even though he paid those fees before the discharge. There is no question of the background; whether the charging party acted in good faith, whether there was a reason for his delinquency, whether there was actually a waiver by the union of such delinquency. If these matters had been relevant under the sole limited issue before the Board there would have been copious evidence adduced by the General Counsel.

belated fee necessarily inconsistent with IATSE's exercise of its legal right to have him terminated for his past delinquency under the contract. Acceptance of Balthrope as a member, while giving him no immunity to discharge under the contract, did give him certain prospective employment opportunities which nonunion employees would not enjoy. Thus, immediately after Balthrope's discharge IATSE made its services available to him as a union member and obtained other employment for him with no loss of earnings.

Accordingly, on the basis of the foregoing and the record as a whole, we would sustain the Trial Examiner's dismissal of the complaints herein.

Dated, Washington, D. C., June 21, 1956.

IVAR H. PETERSON, Member
STEPHEN S. BEAN, Member
National Labor Relations Board

APPENDIX A

Notice to All Employees Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We will not discourage membership in any labor organization of our employees or encourage membership in Local 683 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, by discharging employees or in any

other manner discriminating in regard to the tenure of employment or terms or conditions of employment of our employees.

We will not in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist any labor organization to bargain collectively through representatives for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by a valid agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

We will offer Hayden A. Balthrope immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and, jointly and severally with Local 683 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, make him whole for any loss of pay suffered as a result of the discrimination against him.

All our employees are free to become or remain members of the above-named labor organization, or any other labor organization, or to refrain from such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3)

of the Act. We will not discriminate in regard to hire or tenure of employment or any term or condition of employment against any employees because of membership in or activity on behalf of any such labor organization.

Technicolor Motion Picture
Corporation
(Employer)

Dated.....

By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX B

Notice: Local 683 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, and to All Employees of Technicolor Motion Picture Corporation Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We will not cause or attempt to cause Technicolor Motion Picture Corporation, its successors or assigns, to discriminate in regard to the hire or tenure of employment or the terms or conditions of employment of its employees in violation of Sec-

tion 8 (a) (3) of the Act, except in the manner and to the extent authorized in Section 8 (a) (3) of the Act.

We will not in any other manner restrain or coerce employees of Technicolor Motion Picture Corporation, its successors, or assigns, in the exercise of their rights guaranteed in Section 7 of the Act, except in the manner and to the extent that such rights may be affected by an agreement requiring membership in a labor organization, as a condition of employment, as authorized by Section 8 (a) (3) of the Act.

We will, jointly and severally with Technicolor Motion Picture Corporation, its successors and assigns, make whole Hayden A. Balthrope, for any loss of pay suffered as a result of the discrimination against him.

Local 683 of the International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, AFL-CIO

(Labor Organization)

Dated.....

By .....

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Affidavit of Service by Mail and Post Office Return Receipts Attached.

[Title of Board and Causes.]

RESPONDENT LOCAL 683'S MOTION FOR RECONSIDERATION AND REQUEST FOR ORAL ARGUMENT THEREON

Comes now Film Technicians Local 683, I.A.T.S.E., Respondent in the above-entitled proceeding and pursuant to the provisions of Sections 102.47 and 102.49 of the Rules and Regulations hereby moves the National Labor Relations Board for reconsideration of its Decision and Order in the above-captioned case (115 N.L.R.B., No. 261) dated June 21, 1956, and requests oral argument before the Board upon such reconsideration, based upon the following grounds:

I.

In its Decision of June 21, 1956, herein, the Board failed to pass upon additional grounds for dismissal of the Consolidated Complaint not considered or relied upon by the Trial Examiner but raised by this Respondent.

In the light of his disposition of the case upon other grounds, the Trial Examiner herein found it unnecessary to pass upon the Respondent Union's contentions that:

(1) The "record reveals no discriminatory motive for Balthrope's discharge".

(2) The record "contains no independent evidence of interference, restraint or coercion directed to the respondent firm's employees".

(3) The charging party "did not, in fact suffer any loss of wages or other benefits".

(4) The "Aluminum Workers doctrine, even if applicable, ought not to be applied retroactively to invalidate a discharge permissible under the decisional doctrine recognized as valid when it took place".

(I.R., p. 14, line 54 to p. 15, line 14, inclusive.)

By its Decision herein, the Board "adopts only the factual findings of the Trial Examiner" and "Conclusions of Law Nos. 1 and 2 as set forth in the Intermediate Report", but nowhere passes upon or disposes of these additional grounds of defense raised by the Respondent Local 683 in its own findings and conclusions.

II.

The Board has ignored these important contentions specifically urged by this Respondent in its briefs herein.

In the "Reply Brief of Respondent Local 683, I.A.T.S.E. in Support of Intermediate Report and Recommended Order" dated December 30, 1955, this Respondent specifically urged the Board (P. 44) to consider the above-mentioned issues not passed upon by the Trial Examiner in the event that it concluded, (contrary to the Trial Examiner), that the Aluminum Workers doctrine (111 N.L.R.B. 411, 112 N.L.R.B. 619) was applicable.

Respondent thus specifically requested (Reply Brief, p. 44) that, should the Board find it necessary to pass upon these alternative grounds of defense, the following portions of its "Brief" to the

Trial Examiner, dated October 24, 1955, be considered in detail by the members of the Board:

(1) "VI. In any event, the Aluminum Workers decision should not be applied retroactively to invalidate a discharge authorized by established Board rulings still in effect when it took place." (Respondent Union's Brief to the Trial Examiner, Pp. 31-32.)

(2) "VII. In the present case, there is no evidence of discriminatory motivation, within the meanings of Sections 8 (a) (3) and 8 (b) (2)." (Ibid, Pp. 33-35.)

(3) "VIII. There is no independent evidence of interference or restraint or coercion of employees within the meaning of Sections 8 (a) (1) and 8 (b) (1) (A)." (Ibid, Pp. 36-37.)

(4) "IX. There is no evidence herein of any loss of wages or other benefits by the charging party." (Ibid, p. 38.)

Although the majority of the Board, consisting of the Chairman and Members Murdock and Rodgers, concluded that "the principle enunciated in the Aluminum Workers case is applicable to the particular facts herein", both their majority decision and the dissenting opinion of Members Peterson and Bean disclose that Respondent's alternative grounds of defense were ignored and not disposed of either directly or indirectly.

III.

This Respondent intends to urge these objections to the Decision and Order of the Board along

with its other legal objections in appropriate proceedings before the United States Court of Appeals for the Ninth Circuit.

Respondent Local 683 feels confident that it has sufficiently urged these alternative grounds of defense to the Trial Examiner and to the Board itself to permit their consideration by the United States Court of Appeals for the Ninth Circuit in subsequent proceedings which may hereafter be instituted pursuant to Section 10 (e) and/or Section 10 (f) of the Act. In fairness to the Board we desire, however, by means of this "Motion for Reconsideration and Request for Oral Argument Thereon" to first give this agency an opportunity to expressly consider and render its opinion and decision with respect to these particular contentions which have hitherto been ignored by both the Trial Examiner and the members of the Board, at least so far as the record now indicates.

Dated this 25th day of June, 1956.

Respectfully submitted,

GILBERT, NISSEN & IRVIN,

/s/ By ROBERT W. GILBERT,

Attorneys for Respondent, Film Technicians Local No. 683, I.A.T.S.E.

[Title of Board and Causes.]

MOTION FOR RECONSIDERATION

Comes now Technicolor Motion Picture Corpora-

tion, one of the Respondents in the above-entitled matters, and pursuant to the provisions of Sections 102.47 and 102.49 of the Rules and Regulations hereby moves the National Labor Relations Board for reconsideration of its Decision and Order in the above-captioned case (115 N.L.R.B., No. 261) dated June 21, 1956, based upon the following grounds:

I.

Respondent Technicolor Motion Picture Corporation hereby joins in and concurs with the "Motion for Reconsideration and Request for Oral Argument" heretofore filed by Respondent Local 683 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada and dated June 25, 1956.

II.

Respondent Technicolor Motion Picture Corporation hereby incorporates by this reference Paragraphs I to III, inclusive, of said "Motion" of Respondent Local 683, IATSE, and adopts the grounds for reconsideration stated therein the same as if fully set forth in this motion.

Dated: Beverly Hills, California, this 29th day of June, 1956.

COHEN AND ROTH,
/s/ By LESTER WILLIAM ROTH,
Attorneys for Technicolor Motion Picture Corporation

Affidavit of Service Attached.

[Title of Board and Causes.]

ORDER DENYING MOTIONS

On June 21, 1956, the Board issued a Decision and Order[1] in the above-entitled proceeding. Thereafter, on June 27, 1956, counsel for Respondent Local 683 filed a Motion for Reconsideration and Request for Oral Argument Thereon. On July 2, 1956, Respondent Employer filed a Motion for Reconsideration in which it joined in and concurred with Respondent Local 683's motion. The Board having duly considered the matter,

It Is Hereby Ordered that the said motions be, and they hereby are, denied for the reason that they contain no issues which were not previously considered by the Board; and

It Is Further Ordered that the request for oral argument be, and it hereby is, denied.

Dated, Washington, D. C., July 6, 1956.

By direction of the Board:

FRANK M. KLEILER,
Executive Secretary

Affidavit of Service by Mail and Postal Return Receipts Attached.

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[1] 115 NLRB No. 261.

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

TECHNICOLOR MOTION PICTURE CORPORATION and LOCAL 683 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, AFL-CIO,
Respondents.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Relations Board—Series 6, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a consolidated proceeding had before said Board, entitled, "Technicolor Motion Picture Corporation and Hayden A. Balthrope, An Individual" and "Local 683 of The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of The United States and Canada, AFL-CIO and Hayden A. Balthrope, An Individual," the same being known as Case Nos. 21-CA-2172 and 21-CB-698 respectively before said Board,

such transcript including the pleadings and testimony and evidence upon which the order of the Board in said consolidated proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

1. Stenographic transcript of testimony taken before Trial Examiner Maurice M. Miller on October 4 and 5, 1955, together with all exhibits introduced in evidence.

2. Copy of Trial Examiner Miller's Intermediate Report and Recommended Order (annexed to item 4 hereof); and copy of Order transferring case to the National Labor Relations Board, both issued on November 17, 1955, together with affidavit of service and United States Post Office return receipts thereof.

3. General Counsel's statement of exceptions to the Intermediate Report and Recommended Order, received by the Board on December 12, 1955.

4. Copy of Decision and Order issued by the National Labor Relations Board on June 21, 1956, with copy of Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

5. Motion for Reconsideration and request for oral argument thereon filed by Respondent Local 683 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Op-

erators of the United States and Canada, AFL-CIO (hereinafter called Local 683) on June 27, 1956.

6. Motion for Reconsideration filed by Respondent Technicolor Motion Picture Corporation (hereinafter called the Company) on July 2, 1956.

7. Copy of Order denying motions of Local 683 and the Company for consideration and denying Local 683's request for oral argument, issued by the National Labor Relations Board on July 6, 1956, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 2nd day of November, 1956.

[Seal] /s/ FRANK M. KLEILER,
Executive Secretary, National
Labor Relations Board

[Endorsed]: No. 15297. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner and Respondent, vs. Technicolor Motion Picture Corporation and Local 683 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, Respondents and Petitioners. Transcript of Record. Petition for Enforcement and Petition for Review of an Order of the National Labor Relations Board.

Filed: November 5, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15297

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

TECHNICOLOR MOTION PICTURE CORPORATION and LOCAL 683 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, AFL-CIO,
Respondents.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondents, Technicolor Motion Picture Corporation, Hollywood, California (hereinafter called Respondent Company), its officers, agents, successors, and assigns, and Local 683 of the International Alliance of Theatrical Stage Employees and Moving Picture

Machine Operators of the United States and Canada, AFL-CIO, Hollywood, California (hereinafter called Respondent Union), its officers, representatives, agents, successors, and assigns. The consolidated proceeding resulting in said order is known upon the records of the Board as "Technicolor Motion Picture Corporation and Hayden A. Balthrope, an Individual, Case No. 21-CA-2172; Local 683 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, Case No. 21-CB-698."

In support of this petition the Board respectfully shows:

(1) Respondent Company is a corporation engaged in business in the State of California and Respondent Union is a labor organization engaged in promoting and protecting the interests of its members in the State of California, both within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on June 21, 1956, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent Company, its officers, agents, successors, and assigns, and to the Respondent Union, its officers, representatives, agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon Respondents by sending

copies thereof postpaid, bearing Government frank, by registered mail, to Respondents' Counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the consolidated proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondents and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring Respondent Company, its officers, agents, successors, and assigns, and Respondent Union, its officers, representatives, agents, successors, and assigns, to comply therewith.

Dated at Washington, D. C., this 24th day of September, 1956.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel, National Labor Relations Board

[Endorsed]: Filed Sept. 25, 1956. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

ANSWER OF RESPONDENT TECHNICOLOR MOTION PICTURE CORPORATION TO PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD, AND CROSS-PETITION FOR REVIEW OF SAID ORDER

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now Technicolor Motion Picture Corporation, Respondent in the above-entitled proceeding, and pursuant to the National Labor Relations Act as amended (61 Stat. 136, 29 U.S.C., §§151, et seq.), hereinafter called "the Act", and Rule 34 of the Rules of this Honorable Court, hereby files its Answer to that certain Petition for Enforcement of an Order of the National Labor Relations Board, dated September 24, 1956, and its Cross-Petition for Review of Said Order, issued by the National Labor Relations Board on June 21, 1956, in Consolidated Case Nos. 21-CA-2172 and 21-CB-698. In support of its Answer and Cross-Petition for Review, this Respondent respectfully shows as follows:

(1) This Respondent admits the allegations contained in paragraphs (1) and (2) of said Petition for Enforcement, except insofar as it is alleged that "unfair labor practices occurred"; that the proceedings before the Board were "duly * * * had"; and that the Board's findings of fact, conclusions of law, and Order were "duly stated * * * and issued",

and as to such excepted allegations, the same are denied by this Respondent. Furthermore, it is true that the acts and conduct of the Respondents herein alleged to constitute the unfair labor practices in question were engaged in within this judicial Circuit.

(2) This Honorable Court has jurisdiction to entertain this Respondent's Cross-Petition for Review and to set aside the Order of the Board as prayed for herein by virtue of Sections 10(f) and 10(e) of the National Labor Relations Act as amended (29 U.S.C. §§160(f) and 160(e)).

(3) This Respondent alleges, as stipulated by and between the Board's General Counsel and both Respondents in these proceedings before the Board and as thereafter found to be the fact by the Trial Examiner and the Board itself, that—

(a) On or about July 31, 1954, Respondent Technicolor and Respondent Local 683 entered into and executed a valid and lawful collective bargaining agreement recognizing said labor organization as the exclusive bargaining representative of certain classifications of employees in an appropriate unit, including film technicians, and providing further (as authorized by Section 8(a)(3) of the Act) that each and every employee subject to said agreement shall, as a condition of continued employment, be and remain a member in good standing of said labor organization on and after the thirtieth day following the beginning of his first employment or the effective date of said agreement whichever is the later.

(b) Hayden A. Balthrope, the Charging Party in these proceedings before the Board, was a film technician employed for a number of years by Respondent Technicolor who became subject to said collective bargaining agreement, but wholly failed to apply for membership and tender the initiation fee uniformly required as a condition for acquiring membership in Respondent Local 683 within the aforementioned 30-day period (as specified by the lawful union-security provision of the collective bargaining agreement and prescribed by Section 8(a)(3) of the Act), although the existence and nature of such lawful requirement of union membership as a condition of continued employment had been brought to his attention and was within his knowledge at all times since shortly after the execution of the said collective bargaining agreement.

(c) Respondent Local 683 made numerous timely written and oral demands upon Respondent Technicolor that this employer comply with the terms of its lawful collective bargaining agreement and discharge the said Hayden A. Balthrope pursuant thereto solely by reason of his deliberate failure to tender the initiation fee uniformly required as a condition of acquiring membership in said labor organization within the aforementioned 30-day period.

(d) The said Hayden A. Balthrope made no effort to tender said initiation fee (which was the only sum which the Respondent Local 683 asked or required that he deposit in connection with his application for membership), until approximately four

months after he was required to do so by the terms of the lawful union security provisions of the collective bargaining agreement and after the Respondent Local 683 had duly requested his discharge.

(e) The Respondent Technicolor thereafter discharged the said Hayden A. Balthrope on February 10, 1955, as repeatedly requested by Respondent Local 683, on account of his previous willful failure to comply with the lawful union membership requirements of the collective bargaining agreement to which he was subject.

(f) Almost immediately following such discharge, Respondent Local 683 obtained employment for said Hayden A. Balthrope as a film technician at another film laboratory in the Hollywood area at a wage equal to that which he was receiving from Respondent Technicolor at the date of discharge, and said Balthrope was thereafter continuously employed in such comparable position under union contract.

(4) This Respondent further alleges that, in the proceedings before the Board herein, the Trial Examiner found without any exception being taken to such findings by the General Counsel, and such findings were adopted by the Board, that there was no issue before the Board with respect to the below enumerated matters—

(a) The validity and legality of the union security provisions of the aforementioned collective bargaining agreement.

(b) The absence of any attempted tender by the

Charging Party (Hayden A. Balthrope) of initiation fees within the 30-day grace period provided by the collective bargaining agreement as required by law.

(c) The absence of any conduct by the Respondent Local 683 which could have given the Charging Party cause to believe that a timely tender of such initiation fee would have been futile.

(d) The knowledge of the Charging Party regarding the union security requirements of the collective bargaining agreement shortly after its execution.

(e) The absence of any waiver or acquiescence by Respondent Local 683 in the Charging Party's untimely tender of initiation fees.

(f) The absence of any misrepresentation or other misleading conduct by Respondent Local 683 which might have made the elements of an adequate tender of initiation fees unclear to the Charging Party.

(g) The availability of union membership to the Charging Party at all times on a non-discriminatory basis upon payment of a non-excessive initiation fee.

(h) The existence of the Charging Party's untimely tender of initiation fees as the only motivation for his requested discharge by Respondent Technicolor.

(i) The absence of any procedural defect in the determination of the Charging Party's delinquency previous to the request of the Respondent Local

683 for his discharge by the Respondent Technicolor.

(5) This Respondent further alleges that, as found by the Trial Examiner without exception thereto by the General Counsel and also found by the Board, the sole issue litigated in the proceedings before the Board was a legal question and not a factual question, to-wit: Whether a non-union employee who fails to make a timely effort to meet his lawful contractual obligation under a valid union-security clause with respect to the tender of an initiation fee, can forestall his valid discharge at the union's timely request within the meaning of the "union shop proviso" to Section 8(a)(3) of the Act by a much-belated attempt to make such tender after the 30-day grace period has expired merely because of an unexplained delay in carrying out the discharge promptly as provided by the collective bargaining contract?

(6) This Respondent further alleges that, as a matter of law, and as found to be the law by the Trial Examiner and the two dissenting members of the National Labor Relations Board in this case—

(a) There was no violation of any of the provisions of the Act in the discharge of the Charging Party (Hayden A. Balthrope) under the terms of the admittedly lawful union-security agreement.

(b) With regard to the payment of initiation fees, as distinguished from dues, time is of the essence, and therefore, an employee who fails to make timely tender of his initiation fee in accordance with the terms of a lawful union-security agree-

ment may be lawfully discharged notwithstanding a belated tender of such initiation fee long after the expiration of the 30-day grace period provided by the Act.

(c) Unexplained delay without the acquiescence of the union in carrying out lawful collective bargaining contract provisions calling for prompt discharge upon notice of failure to tender initiation fees within the 30-day grace period provided by the Act does not indefinitely extend the deadline for such tender by non-union employees.

(7) This Respondent further alleges that the Decision and Order of the Board herein, concurred in by a bare majority of the Members of said Board, misinterprets and misconstrues the Act, and particularly Sections 8(a)(1), 8(a)(3), 8(b)(1)(A) and 8(b)(2) thereof and is therefore contrary to law, based upon an error of law, and amounts to an unconstitutional exercise of the legislative power by an administrative agency within the Executive Department of the United States Government.

(8) This Respondent further alleges that the Board's Decision and Order herein amounts to a denial of due process of law and is contrary to law and based upon an error of law, in view of the below described circumstances:

(a) In the light of his disposition of this case upon other grounds, the Trial Examiner herein expressly found it unnecessary to pass upon certain additional grounds of defense duly raised by the Respondent Local 683, namely that (i) "In the present case, there is no evidence of discriminatory mo-

tivation, within the meanings of Sections 8(a)(3) and 8(b)(2)"; (ii) "There is no independent evidence of interference or restraint or coercion of employees within the meaning of Sections 8(a)(1) and 8(b)(1)(A)"; (iii) "There is no evidence herein of any loss of wages or other benefits by the Charging Party"; (iv) "In any event, the Aluminum Workers decision [111 N.L.R.B. 411, 112 N.L.R.B. 619], even if applicable, ought not to be applied retroactively to invalidate a discharge permissible under the decisional doctrine recognized as valid when it took place."

(b) These four additional grounds of defense, as well as the grounds relied upon by the Trial Examiner and the two dissenting Members of the Board in support of their legal conclusion that the Consolidated Complaint herein should have been dismissed in its entirety, were legally valid and sufficient.

(c) By its Decision herein, the Board "adopts only the factual findings of the Trial Examiner" and his "Conclusions of Law No. 1 and 2 as set forth in the Intermediate Report" but nowhere passed upon or disposed of these four additional grounds of defense in its own additional findings and conclusions.

(d) In its "Reply Brief" of December 30, 1955, Respondent Local 683 specifically urged the Board to consider these four additional grounds of defense which were not considered or relied upon by the Trial Examiner, in addition to the other grounds for dismissal upon which the Trial Examiner based his Intermediate Report and Recom-

mended Order. Nevertheless, the majority decision of Board Chairman Leedom and Members Murdock and Rodgers and the dissenting opinion of Members Peterson and Bean issued on June 21, 1956, (115 N.L.R.B., No. 261) disclose that said four additional grounds of defense were ignored and not disposed of directly or indirectly by the Board although duly urged before the Board by the Respondent Local 683 in this consolidated proceeding.

(e) On June 27, 1956, Respondent Local 683 filed a Motion for Reconsideration and Request for Oral Argument before the Board again urging that the Board pass upon these four alternative grounds of defense which had been ignored by both the Trial Examiner and the Members of the Board, and notifying the Board that Respondent Local 683 "intends to urge these objections to the Decision and Order of the Board along with its other legal objections in appropriate proceedings before the United States Court of Appeals for the Ninth Circuit" which "may hereafter be instituted pursuant to Section 10(e) and/or Section 10(f) of the Act". On July 2, 1956, Respondent Technicolor filed a Motion for Reconsideration by which it joined in and concurred with the foregoing motion.

(f) On July 6, 1956, Frank M. Kleiler, Executive Secretary to the Board, issued a purported "Order" summarily denying said motions for reconsideration and request for oral argument, reciting that such denial of both motions for reconsideration was being ordered at the Board's direction "for the reason that they contain no issues which were not previ-

ously considered by the Board", although the record indicates to the contrary that such issues had not in fact been considered or disposed of in the Board's written Decision and Order.

(9) This Respondent further alleges that in view of the lack of any evidence before the Board of prohibited discrimination, interference, restraint, or coercion of employees within the meaning of the Act or loss of wages or other economic benefits to the Charging Party, the "remedial" provisions of the Board's Order in this case and more particularly the provisions for reinstatement, back pay, and posting of notices are arbitrary, without legal justification, and contrary to the purposes of the Act and therefore, should not be enforced by this Honorable Court.

(10) This Respondent finally alleges that the questioned discharge of Hayden A. Balthrope on February 10, 1955, took place at a time when the National Labor Relations Board had decided in earlier reported cases that a belated tender of financial payments necessary to maintain union membership would not forestall a valid discharge (Chisholm-Ryder, 94 N.L.R.B. 508 (1951); see also Sixteenth Annual Report of the National Labor Relations Board, dated January 3, 1952, p. 185; Seventeenth Annual Report of the National Labor Relations Board, dated January 5, 1953, p. 147; Aluminum Workers, 111 N.L.R.B., No. 63, decided initially on February 1, 1955, after Intermediate Report issued on August 5, 1954, I.R.-493, Case No. 13-CB-303) and that such ruling with respect to dues payments

was not modified by the Board until May 6, 1955, (Aluminum Workers, 112 N.L.R.B., No. 80), several months after the instant charges were filed on February 14, 1955, so that enforcement of an Order requiring reinstatement and back pay under such circumstances would be inequitable and not legally justified under the Congressional policies and purposes set forth in the Act.

Wherefore, this Respondent prays this Honorable Court that it cause notice of the filing of this Answer and Cross-Petition for Review to be served upon the Petitioner National Labor Relations Board, and that this Court take jurisdiction of the consolidated proceedings and of the questions determined therein, and make and enter upon the pleadings, testimony and evidence and proceedings set forth in the certified transcript of the entire record which the Board has stated it intends to file herein, a decree denying the Petition to Enforce the Board's Order with respect to this Respondent, its officers, representatives, agents, successors and assigns, and setting aside, vacating and annulling the whole of said Order of the Board dated June 21, 1956.

Dated: October 3, 1956.

Respectfully submitted,

COHEN & ROTH,

/s/ By LESTER WILLIAM ROTH,

Attorneys for Respondent Technicolor Motion Picture Corporation

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Oct. 11, 1956. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

ANSWER OF RESPONDENT LOCAL 683 TO PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD, AND CROSS-PETITION FOR REVIEW OF SAID ORDER

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now Film Technicians Local 683, of the International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, Respondent in the above-entitled proceeding, and pursuant to the National Labor Relations Act as amended (61 Stat. 136, 29 U.S.C., §§151, et seq.), hereinafter called "the Act", and Rule 34 of the Rules of this Honorable Court, hereby files its Answer to that certain Petition for Enforcement of an Order of the National Labor Relations Board, dated September 24, 1956, and its Cross-Petition for Review of Said Order, issued by the National Labor Relations Board on June 21, 1956, in Consolidated Case Nos. 21-CA-2172 and 21-CB-698. In support of its Answer and Cross-Petition for Review, this Respondent respectfully shows as follows:

[The balance of the Answer is the same as the Answer of Respondent Technicolor Motion Picture Corporation set out at pages 92-102 of this printed record.]

Respectfully submitted,

GILBERT, NISSEN & IRVIN,
/s/ By ROBERT W. GILBERT,
Attorneys for Respondent Film Technicians Local 683, I.A.T.S.E.

[Endorsed]: Filed Oct. 12, 1956. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH PETITIONER INTENDS TO RELY

1. The Board properly found that by insisting upon and obtaining Balthrope's discharge for non-payment of an initiation fee after he had in fact paid such fee, respondent union violated Section 8 (b) (2) and (1) (A) of the Act.

2. The Board properly found that by acceding to the union's demand for Balthrope's discharge the Company violated Section 8 (a) (3) and (1) of the Act.

November 2, 1956.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel, National Labor Relations Board

[Endorsed]: Filed Nov. 5, 1956. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH RESPONDENTS AND CROSS-PETITIONERS INTEND TO RELY

In the above-entitled proceeding, Respondents and Cross-Petitioners, Technicolor Motion Picture Corporation and Film Technicians Local 683, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, will urge and rely upon the following points:

1. Under the stipulated facts of this case, the Respondent Local 683's insistence upon and obtaining of Balthrope's discharge for failure to make timely tender of an initiation fee, in accordance with the terms of the admittedly lawful union security agreement did not, as a matter of law, constitute a violation of either Section 8(b)(2) or Section 8 (b)(1)(A) of the National Labor Relations Act, as amended.

2. The Board's Decision and Order herein insofar as it finds that Respondent Local 683 violated Sections 8(b)(2) and 8(b)(1)(A) of said Act is contrary to law, based upon an error of law, and amounts to an unconstitutional exercise of legislative powers by the Board.

3. Under the stipulated facts in this case, the Respondent Technicolor Motion Picture Corporation's acceding to the Respondent Local 683's de-

mand for Balthrope's discharge in accordance with the terms of the admittedly lawful union security agreement did not, as a matter of law, constitute a violation of either Section 8(a)(3) or Section 8 (a)(1) of the National Labor Relations Act, as amended.

4. The Board's Decision and Order herein insofar as it finds that Respondent Technicolor violated Sections 8(a)(3) and 8(a)(1) of said Act is contrary to law, based upon an error of law, and amounts to an unconstitutional exercise of legislative powers by the Board.

5. The Board's Decision and Order herein amounts to a denial of due process of law and is contrary to law and based upon an error of law in that the Trial Examiner and the Board wholly failed to consider, pass upon and dispose of four specific grounds of defense duly raised by the Respondents, which defenses were legally valid and sufficient, to-wit: (a) the absence of any evidence of discriminatory motivation within the meaning of Sections 8(a)(3) and 8(b)(2); (b) the absence of any independent evidence of interference or restraint or coercion of employees within the meaning of Sections 8(a)(1) and 8(b)(1)(A); (c) the absence of any evidence of any loss of wages or other benefits by Balthrope; (d) the permissible character of Balthrope's discharge under the Board's decisional doctrine prevailing at the time that it took place.

6. The remedial provisions of the Board's Order in this case, and more particularly the provisions

for reinstatement, back pay and posting of notices are arbitrary, without legal justification, and contrary to the declared Congressional policies and purposes of the National Labor Relations Act, as amended, and therefore should not be enforced.

7. The remedial provisions of the Board's Order in this case, and more particularly, the provisions for reinstatement and back pay, are inequitable, in view of the fact that the questioned discharge took place at a time when the National Labor Relations Board had decided in earlier reported cases that a belated tender of financial payments necessary to acquire or maintain union membership would not forestall a valid discharge, and such provisions are not legally justified under the declared Congressional policies and purposes of the National Labor Relations Act, as amended, and therefore should not be enforced.

8. The Board's Order insofar as it finds these Respondents in violation of said Act and seeks to provide a "remedy" for such purported violations is improper and contrary to law by reason of the foregoing, and therefore, should be vacated, set aside and annulled.

Dated: November 9, 1956.

GILBERT, NISSEN & IRVIN,

/s/ By ROBERT W. GILBERT,
Attorneys for Respondent and Cross-Petitioner Film Technicians Local 683, I.A.T.S.E.

COHEN & ROTH,

/s/ By LESTER WILLIAM ROTH,
Attorneys for Respondent and
Cross-Petitioner Technicolor
Motion Picture Corporation

Affidavit of Service Attached.

[Endorsed]: Filed Nov. 10, 1956. Paul P. O'Brien, Clerk.

No. 15297

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TECHNICOLOR MOTION PICTURE CORPORATION; AND LOCAL 683, INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE OPERATORS OF THE UNITED STATES AND CANADA, AFL–CIO, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

KENNETH C. McGUINESS,
General Counsel,
STEPHEN LEONARD,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
FREDERICK U. REEL,
Attorney,
National Labor Relations Board.

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AUTHORITIES CITED

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ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

This case is before the Court upon petition of the National Labor Relations Board, pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151 *et seq.*),[1] for enforcement of the Board's order issued on June 21, 1956, against the respondents, herein called the Company and the Union, respectively. The Board's Decision and Order are reported at 115 NLRB 1607. This Court has jurisdiction of the proceeding, the un-

[1] The pertinent provisions of the Act are set forth in the Appendix, pp. 12–15.

fair labor practices having occurred at Los Angeles, California, where the Company processes photographic film, a substantial amount of which moves in interstate commerce (R. 27–28; 6, 10, 14).

STATEMENT OF THE CASE

The Board's findings, conclusions, and order

A. The issue

Briefly stated, the Union acting under a valid union-security agreement demanded that the Company discharge employee Hayden Balthrope for his failure to pay an initiation fee, and repeated this demand after Balthrope had in fact paid the fee. The Company complied with the Union's final demand with knowledge of Balthrope's payment. The question presented is whether, notwithstanding Balthrope's earlier failure to pay the fee, the Board properly found that the Union could not lawfully press for and obtain his discharge after he had paid the sum requested of him by the Union. The undisputed facts,[2] stated in more detail, are as follows:

B. The facts

On or about July 31, 1954, the Company and the Union entered into a valid agreement, requiring *inter alia* that persons then in the Company's employ become and remain union members thirty days after the effective date of the agreement (R. 6–7, 18). So far as the record shows, employee Hayden Balthrope

[2] The facts are to be found in the Stipulation (R. 18–24), and in those allegations of the Complaint (R. 5–9) which were admitted in the Answers (R. 10–17).

became aware of this provision on or before September 7 (R. 18–19). Meanwhile, on August 31, the Union wrote the Company demanding the discharge of Balthrope for failure to pay an initiation fee and dues (R. 19, 22–23). The Company refused to discharge Balthrope, and repeated this refusal when the Union on October 1 repeated its demand (R. 19–20). Balthrope thereafter on December 7 applied for union membership and paid his initiation fee of $250 to the Union; this was the only sum the Union asked or required of him (R. 20). Notwithstanding the Union's acceptance of this tender, it subsequently made oral demands on the Company for Balthrope's discharge under the contract (R. 20). The Company, which was advised on January 27, 1955, that Balthrope had applied for membership and paid his initiation fee, at first resisted the demands for his discharge, but eventually capitulated and discharged him on February 10 (R. 33, 34; 7, 15, 20). The Union on the same day arranged for Balthrope to secure employment at "comparable" wage rates with another employer in the industry (R. 20–21, 23–24).

C. The Board's conclusions

The Board, relying on *Aluminum Workers International Union,* 112 NLRB 619, enforced, 230 F. 2d 515 (C. A. 7), held that by causing the Company to discharge Balthrope after he paid his initiation fee the Union violated Section 8 (b) (2) and (1) (A) of the Act, and the Company by yielding to the Union's demand violated Section 8 (a) (3) and (1) (R. 60–64). Two Board members dissented (R. 71–

75), agreeing with the Trial Examiner (R. 44–46) that the doctrine of the *Aluminum Workers* case was applicable to belated tenders of dues, but not of initiation fees. As the majority of the Board noted, relying upon the stipulation, the fee tendered by Balthrope "satisfied completely all of the financial demands made" by the Union, and "the question as to whether he should be required to pay * * * dues that would have been payable if he had joined the Union when first asked, is not raised because there was no demand for such dues" (R. 63).

D. The Board's order

The Board ordered both respondents to cease and desist from the unfair labor practices found and from any other infringement of the employees' rights under Section 7, to take appropriate action to effectuate Balthrope's reinstatement with back pay for any loss of pay he may have suffered (see particularly R. 65, n. 6), and to post appropriate notices (R. 67–71, 75–78).

ARGUMENT

A. Introduction—the issue defined

Although the general scheme of the statute makes it an unfair labor practice to discharge an employee for nonmembership in a union, Congress in the original Wagner Act created an exception to this general rule by permitting an employer and the labor organization representing his employees to enter into an agreement making union membership a condition of employment. 49 Stat. 449, Sec. 8 (3). This exception,

which the courts held was to be narrowly construed,[3] was further limited by Congress in Sections 8 (a) (3) and 8 (b) (2) of the Taft-Hartley Act. Congress provided in Section 8 (b) (2) that even where such an agreement existed, a union could not lawfully cause or attempt to cause the discharge of an employee whose union membership was "denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required" of members. And Congress provided in Section 8 (a) (3) that even under a union security agreement—

> * * * no employer shall justify any discrimination against an employee for nonmembership in a labor organization * * * if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; * * *.

In the light of these provisions it is clear that the Union could have lawfully obtained Balthrope's discharge during the period when his initiation fee was due and untendered. It is equally clear that if the Union had not requested Balthrope's discharge until after he paid his initiation fee, the discharge would have been unlawful, as based upon "reasons other than the failure of the employee" to pay the fee. The instant case falls between these two poles. Here

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[3] *N. L. R. B.* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685, 694–695; *N. L. R. B.* v. *Don Juan, Inc.*, 178 F. 2d 625, 627 (C. A. 2).

the Union unsuccessfully demanded Balthrope's discharge before he paid the fee, but it renewed its demand—this time successfully—after he paid the fee. The question, therefore, is whether the Board properly held that the Union's final and successful demand, made after it accepted Balthrope's fee, is not preserved from the illegality inherent in such a demand at that time merely because the Union had made similar demands at an earlier and concededly proper time.

B. The Board properly found that the Union in causing Balthrope's discharge violated Section 8 (b) (2) and (1) (A) of the Act, and that the Company in discharging him violated Section 8 (a) (3) and (1)

The Supreme Court, adhering to its previously expressed view that the union security provisions of the Act should be strictly construed (see *supra,* p. 5, n. 3), stated in *Radio Officers' Union* v. *N. L. R. B.,* 347 U. S. 17, 41, that

> Congress intended to prevent utilization of union security agreements for any purpose other than to compel payments of union dues and fees. Thus Congress recognized the validity of unions' concern about "free riders," i. e., employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union, and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason.

Congress, in short, has limited the lawful discharge of employees under the terms of a union security

agreement to "free-riders" unwilling to contribute their fair share to the union's support by paying the regularly required dues and fees. This one exception to an otherwise total prohibition against discharge based on nonunion activities rests solely on a recognition by Congress that a union operating under a union security agreement is entitled to financial support by all who enjoy the benefits of the contract, and is permitted only in order that a union operating under such a contract may effectively insist upon such support.

Applying those principles to the instant case, we submit that Balthrope after he paid his fee could not be considered a "free rider."[4] The Union when it accepted his fee had received the financial protection Congress intended. When the Union renewed its demand for Balthrope's discharge *after* he paid his fee, it was demanding his discharge for some reason other than failure to pay the fee and hence violated Section 8 (b) (2). Similarly, the Company, knowing that Balthrope had paid the fee (R. 33; 7, 15), "had reasonable grounds for believing" that the Union was seeking his discharge "for reasons other than" failure to pay the fee, so that the Company in discharging Balthrope violated Section 8 (a) (3).

Squarely in point is *N. L. R. B.* v. *Aluminum Workers Union,* 230 F. 2d 515 (C. A. 7). There the Union demanded the discharge of a dues delinquent

[4] No issue has ever been raised in this litigation as to Balthrope's liability for dues (R. 63; 20). The Union may well have a claim against him for dues, but the record is clear that such a claim, if it exists, has nothing to do with his discharge; under the Stipulation only the initiation fee is involved (R. 20).

employee; the employee then tendered the dues; the union refused the tender and reiterated—this time successfully—the demand for discharge. The court there stated (230 F. 2d at 520):

> * * * prior to [the employee's] expulsion and the operative demand for her discharge, she had tendered to respondent every cent it had demanded for reinstatement. This tender also was refused, and subsequently her expulsion was effected. Against this background of Boness' attempts to pay her way, respondent's action in demanding her discharge becomes the more suspect, and it would appear that "non-payment of dues" was asserted as a lily-white front to cloak a demand for her discharge based on some other reason best known to respondent's officials.
>
> We would, we think, subvert the policy of the Act were we to interpret this case as presenting the "free rider" situation which the discharge exceptions of § 8 (a) (3) and (b) (1) were designed to meet.

This same result follows *a fortiori* in the instant case, for in *Aluminum Workers* the union rejected the tender, whereas in the instant case the Union accepted Balthrope's payment.

The arguments advanced by the respondents in the instant case were likewise advanced in the *Aluminum Workers* case, and were there rejected, either expressly or impliedly, by the Seventh Circuit. There, as here, it was urged that the union's original request for discharge was proper under the contract, and that the company's failure to discharge at that time was a breach of the contract. But this conceded fact

does not justify the union's renewed demand for the discharge after it accepted the fee. Since Balthrope was not a "free rider" at the time of the "*operative* demand for [his] discharge" (*Aluminum Workers, supra,* emphasis supplied), that demand and the ensuing discharge were unlawful even though similar earlier demands were legitimate.

As the union argued in the *Aluminum Workers* case, so here respondents contend that their actions were lawful under the Board's decision in *Chisholm-Ryder Co.,* 94 NLRB 508, and that the Board's *Aluminum* decision (112 NLRB 619, 621, n. 7), expressly overruling the *Chisholm* case, should not be applied retroactively to events antedating the *Aluminum* case. This contention should be rejected here, as it was in the Seventh Circuit, for two reasons. In the first place, the *Chisholm* case is distinguishable from the case at bar. In *Chisholm* the Board held "that the Act does not prohibit a union * * * from rejecting a legitimate offer of payment in order to preserve a delinquency which may be used as the basis for a discharge." 94 NLRB at 514. In the instant case the Union *accepted* the payment, and hence did not "preserve a delinquency" as in the *Chisholm* case. In short, the *Chisholm* decision was never applicable to the facts of this case, and any reliance upon it by respondents was misplaced. Second, even if *Chisholm* were applicable, we submit that the Board, having overruled a previous decision, could validly apply what it regarded as the proper interpretation of the law to the case before it. Administrative agencies, like courts, are free to overturn erroneous precedents

even though the new decision may appear to work a hardship on one of the parties involved. See *S. E. C.* v. *Chenery Corp.,* 332 U. S. 194; *Great Northern Ry.* v. *Sunburst Co.,* 287 U. S. 358, 364; Davis, *Administrative Law,* West Pub. Co., 1951, pp. 558–559. This Court's decision in *N. L. R. B.* v. *Guy F. Atkinson Co.,* 195 F. 2d 141, 145–151, is not to the contrary. That case involved the Board's attempt to apply retroactively a new *jurisdictional policy,* so as to sweep within its jurisdiction conduct which it had theretofore administratively determined to leave unregulated. The instant case, on the other hand, involves at most the retroactive application of a substantive rule of labor law. Moreover, as we have seen, the decision here is not inconsistent with the Board's earlier *Chisholm* case, but is readily distinguishable. For post-*Atkinson* cases dealing with the problem of retroactivity see *N. L. R. B.* v. *Stoller,* 207 F. 2d 305, 307–308 (C. A. 9), certiorari denied, 347 U. S. 919; *Foreman & Clark, Inc.* v. *N. L. R. B.,* 215 F. 2d 396, 409–410 (C. A. 9), certiorari denied, 348 U. S. 887; *N. L. R. B.* v. *National Container Corp.,* 211 F. 2d 525, 534–535 (C. A. 2).

Respondents also urged before the Board that they were not discriminatorily motivated in their treatment of Balthrope, and that there is no showing that any employees were interfered with, restrained, or coerced in the exercise of their rights. But since the demand for, and the accomplishment of, Balthrope's discharge after he paid his fee were by that very token "for reasons other than the failure of the employee to tender * * * the initiation fees"

(Sections 8 (a) (3) and 8 (b) (2)), the Board was not required to produce "specific evidence of intent to encourage or discourage" membership, or "evidence as to the results which may flow" from the statutory violation. *Radio Officers' Union* v. *N. L. R. B.,* 347 U. S. 17, 44–46, 48–49, 51–52. Finally, respondents' suggestion that Balthrope suffered no financial loss is a matter appropriate for post-decree proceedings, as the Board expressly recognized (R. 65, n. 6). See this Court's decisions in *N. L. R. B.* v. *Ronney & Sons,* 206 F. 2d 730, 738, certiorari denied, 346 U. S. 937; *N. L. R. B.* v. *Alaska Steamship Co.,* 211 F. 2d 357, 360–361; *N. L. R. B.* v. *Sterling Furniture Co.,* 227 F. 2d 521, 522.

CONCLUSION

For the reasons stated above, the order of the Board should be enforced.

Respectfully submitted.

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JANUARY 1957.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136; 29 U. S. C., Secs. 151 *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or

assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h), and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7;

* * * * *

(2) To cause or attempt to cause an employee to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all

the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1937

No. 15297

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner and Respondent,

vs.

TECHNICOLOR MOTION PICTURE CORPORATION and LOCAL 683 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, A.F.L.-C.I.O.,

Respondents and Cross-Petitioners.

On Petition for Enforcement and Petition for Review of an Order of the National Labor Relations Board.

REPLY BRIEF OF RESPONDENTS AND CROSS-PETITIONERS.

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REPLY BRIEF OF RESPONDENTS AND CROSS-PETITIONERS.

Jurisdictional Statement.

This case is before the Court upon petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act as amended, for enforcement of the Board's Order issued on June 21, 1956, against the Respondents Technicolor Motion Picture Corporation and Local 683 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, A.F.L.-C.I.O. (hereinafter referred to respectively as "the

Company" and "the Union"), and also upon the said Respondents' cross-petitions for review of such Order, pursuant to Section 10(f) of the same statute. (61 Stat. 136, 29 U.S.C., Sec. 151, *et seq.*)

This Honorable Court has jurisdiction of this proceeding and is empowered to make and enter a decree setting aside the Order of the Board as prayed for by Respondents and Cross-Petitioners, by virtue of the aforesaid Sections 10(f) and 10(e) of the National Labor Relations Act as amended. (29 U.S.C., Secs. 160(f) and 160(e).)

The acts and conduct of the Respondents and Cross-Petitioners herein alleged to constitute the "unfair labor practices" in question occurred at Los Angeles, California, within this judicial Circuit. [R. 10, 14, 93, 103.]

Statement of the Case.

Since, in our opinion, the Board's statement of the case in its opening brief (Board's Br. pp. 2-4) does not contain a complete or wholly accurate statement of the questions involved, the undisputed facts and the manner in which said questions have been raised, Respondents and Cross-Petitioners herewith respectfully submit this further statement of the case for the consideration of the Court. (See Rule 18, subd. 3.)

A. The Questions Involved.

The principal issue presented herein is whether or not as a matter of law, under the stipulated facts and circumstances of this case, a non-union employee (Hayden A. Balthrope) who wholly failed to make or attempt to make a *timely* effort to meet his contractual obligation under a valid union-security agreement with respect to the tender of the initiation fee uniformly required as a condition for acquiring membership in the Union, effectively forstalled his valid discharge at the Union's

timely request within the terms of the "union shop" proviso to Section 8(a)(3) of the National Labor Relations Act as amended, by his much-belated payment of such initiation fee after the expiration of the usual 30-day grace period, merely because of an unexplained delay by the Company in carrying out such discharge promptly as provided by the collective bargaining agreement, even where there is no evidence of waiver by the Union of such employee's contractual obligation for timely payment nor any evidence of discriminatory motivation for such discharge on the part of either the Company or the Union.

In addition, this case presents an important question as to whether the Board's Decision and Order herein amount to a denial of due process of law, and are erroneous in that the Trial Examiner and the Board wholly failed to consider, pass upon, and dispose of four specific grounds of defense duly raised by the Respondents, which defenses were legally valid and sufficient, to-wit:

(a) the absence of any evidence of discriminatory motivation within the meaning of Sections 8(a)(3) and 8(b)(2);

(b) the absence of any independent evidence of interference or restraint or coercion of employees within the meaning of Sections 8(a)(1) and 8(b)(1)(A);

(c) the absence of any evidence of any loss of wages or other benefits by Balthrope;

(d) the permissible character of the questioned discharge under the Board's decisional doctrine prevailing at the time that it took place.

Finally, this case presents a legal and equitable question as to the validity and propriety, under the declared Congressional policies and legislative purposes embodied in the National Labor Relations Act as amended, of the remedial provisions of the Board's Order herein.

B. The Undisputed Facts.

The undisputed material facts which have been established by stipulation (General Counsel's Ex. 2 [R. 18-21]) may be briefly summarized in chronological order as follows:

July 31, 1954: The Company and the Union entered into *an admittedly valid union-security agreement* (General Counsel's Ex. 2, Pars. 1 and 3 [R. 18 and 19]; see also Ex. 1-E, Par. 4 [R. 6-7]; Ex. 1-M, Par. IV [R. 15]; and Ex. 1-I, Par. IV [R. 11]), providing that the Company recognizes the Union as the exclusive bargaining representative of all classifications listed therein, including film technicians; that each and every employee subject to the agreement shall be and remain a member in good standing of the Union *on and after the thirtieth day* following the beginning of his first employment or the effective date of the agreement, whichever is the later; and that within *"a reasonable time, but not to exceed 3 days, after receipt of written notice from the Union* that any such employee is not a member as above required," the Company "shall discharge any such employee." [See also the Trial Examiner's factual findings, R. 29 and 31, adopted by the Board, R. 61 and 71.]

Some time between July 31, 1954, and September 5, 1954: Film Technician Hayden A. Balthrope, an employee of the Company, was informed by management officials and gained knowledge from other sources of the execution of the July 31, 1954, agreement and the language of the union-security provisions therein contained, *"shortly after the said execution of said contract."* (General Counsel's Ex. 2, Par. 2 [R. 18-19]; see also R. 29-30; 61, fn. 1; R. 71.)

August 31, 1954: Since Balthrope "had made no application for membership in nor tendered initiation fees to the Union" *within the 30-day grace period* and wholly "failed to apply for membership and join the Union in conformance with and as required by . . . the terms of the union security provision of the contract," the Union made a lawful written demand on the Company for his discharge within 3 days thereafter pursuant to the terms of said valid collective bargaining agreement. (General Counsel's Ex. 2, Pars. 2 and 3 [R. 19]; see also R. 22-23, 30-31, 61, 71-72. *Cf.* General Counsel's Ex. 1-E, Par. 6 [R. 7].)

October 1, 1954: After the unexplained failure of the Company to make the requested discharge, the Union repeated its lawful written demand for Balthrope's discharge pursuant to the valid union security agreement which was likewise somehow not acted upon. (General Counsel's Ex. 2, Par. 3 [R. 19-20]; see also R. 31-32, 61, 72. *Cf.* General Counsel's Ex. 1-E, Par. 6 [R. 7]; General Counsel's Ex. 1-I, Par. IX [R. 12]; General Counsel's Ex. 1-M, Par. IX [R. 16].)

Between October 1, 1954, and some date in January, 1955: The Union made numerous oral demands upon the Company that it "live up to the terms of its collective bargaining agreement and pursuant to the terms of the valid union security clause discharge Balthrope," and the Company "continued to fail to accede to those demands." (General Counsel's Ex. 2, Par. 3 [R. 20]; see also R. 32, 33, 61, 72; compare General Counsel's Ex. 1-E, Par. 6 [R. 7].)

December 7, 1954: For the first time *(more than 3 months after expiration of the 30-day grace period),* Balthrope made application for union membership, accompanied by his check for the uniformly

required initiation fee. (General Counsel's Ex. 2, Par. 4 [R. 20]; see also R. 32, 61-62, 72; compare General Counsel's Ex. 1-E, Par. 5 [R. 7]; General Counsel's Ex. 1-M, Par. V [R. 15]; and General Counsel's Ex. 1-I, Par. V [R. 11].)

February 7, 1955: The Executive Board of the Union, Local 683, conditionally approved Balthrope's application for union membership. (General Counsel's Ex. 2, Par. 5 [R. 20]; see also R. 33.)

February 10, 1955: The Company discharged Balthrope. (General Counsel's Ex. 2, Par. 6 [R. 20]; see also R. 34 and 62; compare General Counsel's Ex. 1-E, Pars. 7 and 9 [R. 7-8]; General Counsel's Ex. 1-M, Par. IX [R. 15-16]; and General Counsel's Ex. 1-I, Par. IX [R. 11-12].)

February 10, 1955: The Union notified Balthrope in writing that its Executive Board had accepted his application for membership, "subject to the endorsement" of the International Alliance as provided by its Constitution, and informed him in the same letter that the Union had secured another comparable job for him with Consolidated Film Laboratories, since he had been discharged by the Company (Technicolor) "for previous failure to comply with the 'Union Security' provisions of our contract." (General Counsel's Ex. 2, Par. 7, and "Exhibit B" attached thereto [R. 20 and 23-24]; see also R. 34-35, fn. 6; and R. 75.)

February 14, 1955: Balthrope filed the instant unfair labor practice charges against the Company and the Union (General Counsel's Exs. 1-C and 1-D [R. 1-4]), alleging that he was discriminated against in regard to "tenure of employment" on February 10, 1955, by the Company "for a reason other than Balthrope's failure to tender periodic dues and initia-

tion fees uniformly required" and "at the request of and to encourage membership in" the Union, thereby interfering with, restraining and coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

February 15, 1955: Balthrope wrote the Union a reply to its February 10th letter, stating that he had arranged to take the job which it had secured for him at Consolidated Film Laboratories and would report for work there as soon as he was available, and "thanking the Union for its assistance." (General Counsel's Ex. 2, Par. 7 [R. 20-21]; see also R. 35.)

Mid-February, 1955, to "Present Time": Balthrope was continuously employed by Consolidated Film Laboratories under Union contract at comparable wage rates. (General Counsel's Ex. 2, Par. 7 [R. 21]; see also R. 35; 65, fn. 6; R. 75.)

"Some months" after February, 1955: Balthrope's membership application was approved by the International Alliance. (General Counsel's Ex. 2, Par. 5 [R. 20]; see also R. 34.)

In addition to the foregoing stipulated facts, the Board now also seeks to rely (Board's Br. p. 3) upon the findings of the Trial Examiner [R. 33 and 34; see also R. 62] that on or about January 27, 1955, Balthrope informed the Company that he had paid his initiation fee and applied for membership in the Union. Such allegation of the complaint (General Counsel's Ex. 1-E, Par. 8 [R. 7]), although denied by the Union in its answer (General Counsel's Ex. 1-I, Par. VIII [R. 11]; but see General Counsel's Ex. 1-M, Par. VIII [R. 15]), is not supported by any testimony in the record [R. 27], nor covered by the stipulation of facts. (General Counsel's Ex. 2 [R. 18-21].)

C. Proceedings Before the Board.

As noted above, on February 14, 1955, the Charging Party, Hayden A. Balthrope, filed charges [R. 1-4] against the Company (Case No. 21-CA-2172) and the Union (Case No. 21-CB-698), alleging that said "employer" had violated Sections 8(a)(1) and 8(a)(3), and that said "labor organization" had violated Sections 8(b)(1)(A) and 8(b)(2) of the amended National Labor Relations Act.

On August 22, 1955, the then Acting Regional Director for the Board's Twenty-first Region issued a Consolidated Complaint in these two cases (General Counsel's Ex. 1-E [R. 5-9]), which complaint, as amended [R. 26], alleges in essence that because of Balthrope's belated tender of his initiation fee, the Union, by requesting that the Company discharge Balthrope *"for his failure to tender the periodic dues and initiation fees uniformly required as a condition for retaining membership in the Union"* [R. 7], and causing such discharge, had violated the above-cited subsections of Section 8(b), of the Act, and the Company, by complying with such request for discharge, had violated the above-cited subsections of Section 8(a) of the Act.

The Company and the Union, by their respective verified answers to the consolidated complaint [R. 10-17] duly denied that they had committed the alleged unfair labor practices, but admitted the following facts:

(1) Execution of *"a valid union shop agreement"* between the Company and the Union on July 31, 1954.

(2) Notification to the Company of Balthrope's non-tender of initiation fees and request for Balthrope's discharge on October 1, 1954, *"as permitted by the proviso to Section 8(a)(3) of the Act."*

(3) Discharge of Balthrope by the Company on or about February 10, 1955 *"as required by the terms*

of a valid union shop agreement then existing" and *"for failure to tender the initiation fees uniformly required as a condition of acquiring or retaining membership" in the Union "within thirty days after the effective date of said valid union shop agreement."*

A hearing was held before Trial Examiner Maurice M. Miller on October 4, and 5, 1956, at which the only evidence received was the formal papers and a written stipulation as to the material facts. No witnesses were called or testified at the hearing. [R. 27.]

No issue was raised by the General Counsel before the Trial Examiner or the Board in the proceedings below with respect to any of the following matters:

(1) The validity and legality of the union-security provisions of the collective bargaining agreement of July 31, 1954. (See General Counsel's Ex. 2, Par. 1 [R. 18]; R. 26, 42, 61 and 71.)

(2) The absence of any attempted tender of initiation fees by Balthrope within the 30-day grace period provided by said collective bargaining agreement as required by law. [R. 39; see also R. 71-72.]

(3) The absence of any conduct by the Union which could have given Balthrope cause to believe that a timely tender would have been "futile." [R. 39-40.]

(4) The actual knowledge of Balthrope regarding the union-security requirements of the collective bargaining agreement shortly after its execution. [R. 40; see also R. 29-30; 61, fn. 1.]

(5) The absence of any "waiver" of or "acquiescence" in Balthrope's untimely tender of initiation fees by the Union. [R. 40; see also R. 74, fn. 11 and text.]

(6) The absence of any misrepresentation or other misleading conduct by the Union which might have

made the elements of an adequate tender unclear to Balthrope. [R. 41.]

(7) The availability of Union membership to Balthrope at all times on a non-discriminatory basis and the existence of his failure to make timely tender of initiation fees as the sole motivation for Balthrope's requested discharge. (R. 41; see also General Counsel's Ex. 1-E, Par. 6 [R. 7]; General Counsel's Brief to the Board, p. 6, as quoted at R. 74, fn. 11.)

(8) The absence of any procedural defect in the determination of Balthrope's "delinquency" previous to the Union's request for his discharge. [R. 42.]

Thus, this case, as presented to the Trial Examiner by the General Counsel entirely on the basis of stipulated facts, was limited to *"the determination of a legal, rather than a factual, issue"* [R. 39], and, thereafter was presented to the Board by the General Counsel's exceptions to the Intermediate Report upon "the sole limited issue" regarding the validity of Balthrope's discharge *"as a matter of law."* [R. 74, fn. 11.]

On November 17, 1955, Trial Examiner Miller issued his Intermediate Report and Recommended Order [R. 25-59], which proposed "that the Consolidated Complaint in this case, as amended, be dismissed in its entirety."

The Trial Examiner found, contrary to the General Counsel's basic contention [R. 37], that the Board's holding in the *Aluminum Workers* case (112 N.L.R.B. 619, decided May 6, 1955, enf'd 230 F. 2d 515, C. A. 7th, March 2, 1956) was not applicable to the instant case involving delinquent initiation fees and that the belated payment of the initiation fee by Balthrope could not serve as a defense to his discharge under the valid union security agreement. [See R. 62.] In the light of this

proposed disposition of the case [R. 47-58], the Trial Examiner found it unnecessary to pass upon several of the Respondent Union's other principal contentions by way of defense. [R. 57-58.]

Thereafter, on June 21, 1956, the Board issued its Decision and Order [R. 60-78], adopting only the Trial Examiner's "Factual Findings" and first two "conclusions of law" (relating to the status of the Company as an "employer" engaged in commerce and the status of the Union as a "labor organization" within the meaning of Section 2 of the Act). By a divided vote of 3 to 2, the Board reversed the Trial Examiner's findings that there was no violation of the Act by either the Company or the Union. Relying on the *Aluminum Workers* case, *supra,* the 3-Member majority of the Board ordered the Respondents to cease and desist from the alleged unfair labor practices, effectuate Balthrope's reinstatement with back pay and post specified notices. [R. 67-71.]

Balthrope's belated payment of his initiation fee was held by this bare majority to have transformed the Union's otherwise valid request for his discharge into violations of Sections 8(b)(2) and 8(b)(1)(A) of the Act and converted the Company's otherwise lawful discharge of this delinquent employee into violations of Sections 8(a)(3) and 8(a)(1). [R. 60-64.] The two dissenting Board members agreed with the Trial Examiner's recommended dismissal of the Consolidated Complaint herein [R. 71-75] based upon the fundamental distinction between initiation fees and dues which renders the *Aluminum Workers* doctrine inapplicable to the present case and upon the legal conclusion that an employee who fails to make *timely* tender of his initiation fee in accordance with

the terms of a lawful union-security agreement may be lawfully discharged, notwithstanding an intervening belated tender of the required initiation fee.

On June 27, 1956, Respondent Union filed its Motion for Reconsideration of the Board's Decision and Order and Request for Oral Argument, predicated upon the Board's failure to pass upon and dispose of the four additional grounds of defense mentioned above which were not considered or relied upon by the Trial Examiner. These defenses had been duly raised before both the Trial Examiner and the Board in Respondent Union's briefs filed with the agency and dated October 24, 1955 and December 30, 1955. [R. 79-82.] Respondent Company by written motion of its own formally joined in and concurred with the Union's Motion for Reconsideration on July 2, 1956. [R. 82-83.] Both Respondents' Motions for Reconsideration and the Union's Request for Oral Argument were summarily denied by the Board's Executive Secretary on July 6, 1956. [R. 84.]

The Board petitioned for enforcement of its Order herein on September 25, 1956. [R. 89-91.] Both Respondents filed their responses to said petition and cross-petitions for review of the Board's Order on or before October 12, 1956. [R. 92-104.]

ARGUMENT.

Introduction and Summary of Argument.

The General Counsel attempts to define the principal issue in this proceeding by posing two similar but slightly different questions of law, *i.e.:*

> (1) "whether, notwithstanding Balthrope's earlier failure to pay the fee, the Board properly found that the Union could not lawfully press for and obtain his discharge *after he had paid the sum requested of him by the Union.*" (Board's Br. p. 2; emphasis added.)
>
> (2) "whether the Board properly held that the Union's final and successful demand, made *after it accepted Balthrope's fee,* is not preserved from the illegality inherent in such a demand at that time merely because the Union had made similar demands at an earlier and concededly proper time." (Board's Br. p. 6; emphasis added.)

Both of these Board versions of the issue in this case appear to beg the underlying question which relates to the effectiveness of a much belated tender of the uniformly required initiation fee *after the expiration of the 30-day grace period* provided by the statute and the valid union-security agreement in conformity therewith—that is, whether with regard to the payment of initiation fees (as distinguished from periodic dues), time is of the essence.

Respondents and Cross-Petitioners respectfully submit that the majority of the Board misinterpreted and misconstrued the statute, and particularly Sections 8(a)(1), 8(a)(3), 8(b)(1)(A) and 8(b)(2) thereof, and that the instant Order is therefore erroneous, contrary to law, and amounts to an unconstitutional exercise of the legis-

lative power by this administrative agency. This position is supported by the following arguments:

(1) The dissenting Board Members and the Trial Examiner correctly concluded that initiation fees must be tendered within the 30-day grace period provided by a valid union-shop contract to prevent the lawful discharge of a non-union employee.

(2) The dissenting Board Members and the Trial Examiner correctly distinguished the *Aluminum Workers* decision from the present case.

(3) The dissenting Board members and the Trial Examiner properly found that unexplained delay by the employer in carrying out lawful contract provisions calling for prompt discharge upon notice of failure to tender initiation fees within the 30-day grace period, without acquiescence or waiver of the requirement by the contracting union, does not unilaterally extend the deadline for such tender by non-union employees.

(4) Other valid defenses exist, which the Board arbitrarily refused to consider, namely:

(a) The questioned discharge took place at a time when it was authorized by established Board rulings then still in effect.

(b) The record contains no evidence of discriminatory motivation for the questioned discharge within the meaning of Sections 8(a)(3) and 8(b)(2).

(c) The record contains no evidence of interference, or restraint or coercion of employees within the meaning of Sections 8(a)(1) and 8(b)(1)(A).

(d) The record contains no evidence of any loss of wages or other benefits by the dischargee.

I.

The Dissenting Board Members and the Trial Examiner Correctly Concluded That Initiation Fees Must Be Tendered Within the 30-day Grace Period Provided by a Valid Union Shop Contract to Prevent Lawful Discharge of a Non-union Employee.

A. The Language of the Statute.

The Trial Examiner correctly found [R. 52] as did the dissenting Board members [R. 72] that the General Counsel's contentions in the Board proceeding were *"a distortion of the manifest sense of the statute,"* which *"clearly permits agreements making time of the essence,"* with regard to the payment of initiation fees, as distinguished from dues.

Section 8(a)(3) expressly provides that "nothing in this Act, or in any other statute of the United States shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement whichever is the later." It is further provided in Section 8(a)(3) that discrimination cannot be justified under such a union shop contract where the employer has reason to believe that union membership is not available "on the same terms and conditions generally applicable to other members" or has been "denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership."

The elliptical quotation from *Radio Officer's Union v. N.L.R.B.*, 347 U. S. 17, 41 set forth in the Board's brief (p. 6) stops just short of the significant sentence by which the Supreme Court declared that, under this "union

shop" proviso to Section 8(a)(3) dealing with the problem of *"free riders"*—

> ". . . an employer can discharge an employee for non-membership in a union if the employer has entered into a union security contract valid under the Act with such union and if the other requirements of the proviso are met."

As noted previously, it was undisputed in the present case that "the employer has entered into a union security contract valid under the Act"; and it is likewise undisputed that the "other requirements of the proviso" to Section 8(a)(3) were met, *i.e. majority status of the bona fide Union; compliance by the said Union* with the filing requirements of Sections 9(f), (g) and (h); *availability of union membership to the employee* "on the same terms and conditions generally applicable to other members"; and *non-membership of the dischargee solely due to the "failure of the employee to tender the periodic dues and initiation fees* uniformly required as a condition of acquiring or retaining membership" within the 30-day grace period.

The complaint herein, as amended, alleges specifically that all requests and demands by the Union for Balthrope's discharge by the Company were predicated upon "his failure to tender the periodic dues and initiation fees uniformly required as a condition for retaining membership in the Union." [R. 7.]

The General Counsel contends, however, that after Balthrope tendered his initiation fee, he "could not be considered a 'free rider' " and after the Union accepted his fee, it had received all the financial protection afforded by the statute (Board's Br. p. 7), regardless of the fact that such payment of his initiation fee took place several months after the 30-day grace period had expired.

Such a contention cannot be upheld in the face of the specific language of the statute which expressly permits

the enforcement as written of agreements requiring compulsory union membership *"on or after the thirtieth day"* subsequent to the inception of employment or the agreement's effective date, whichever is later.

The Board's majority found, "contrary to the Trial Examiner, that the discharge of Balthrope after he made this payment cannot be defended under the union shop agreement," because "from the moment of payment he no longer could be deemed a 'free rider.'" [R. 63.] If this Board finding was proper, what is the legal significance of the thirty-day grace period established by Congress in Section 8(a)(3) for the achievement of "membership" in the Union by non-member employees?

It is urged, rather, that the Trial Examiner properly interpreted the plain and unambiguous language of the statute which "clearly provides that the acquisition of membership, or at least the tender of an initiation fee, may contractually be required, as a condition of employment, on or after the thirtieth day of a grace period" [R. 46], and, thus, with respect to initiation fees, at least, "the statute would seem to be explicit and leave no room for equitable interpretation." [R. 45.]

Surely, the Board's majority and the General Counsel cannot successfully urge before this Honorable Court of Appeals that the Company and the Union were authorized by Section 8(a)(3) to enter into a valid contract requiring non-union employees to join the Union immediately upon the expiration of the 30-day grace period as a condition of continued employment, but were at the same time forbidden by Sections 8(a)(3) and 8(b)(2) to enforce that requirement of the valid contract as it was written.

The Board's majority accepted the Trial Examiner's factual findings [R. 61], among which was a finding that "Balthrope failed to meet his obligation, under the trade agreement in effect at his place of employment,

with respect to the submission of the initiation fee required by the Respondent Union, within the grace period therein specified" and was "a delinquent employee in this respect." [R. 56.]

The General Counsel cannot and does not deny that, as the dissenting Board members put it, Balthrope was discharged "under the terms of the admittedly-lawful union-security agreement" after he "knowingly and wilfully breached that clause of the contract which specifically required that he join IATSE 30 days after the contract became effective," and indeed, "for a period of approximately 4 months . . . deliberately refused to pay the uniformly required initiation fee which would have given him the union membership required by the contract," although "[p]roper requests for his discharge under the contract had been timely made" by the Union. [R. 71-72.]

Can it then be said by the Board with any degree of accuracy that, under such circumstances, Balthrope "completely satisfied all of the financial demands made" by the Union, through offering his much-belated tender of the regular initiation fee? [R. 63.] The Union's financial demand at all times was that initiation fees must be *"tendered . . . as required within the time limits provided"* by the current collective bargaining agreement. [R. 22.]

The General Counsel concedes that "the Union could have lawfully obtained Balthrope's discharge during the period when his initiation fee was due and untendered." (Board's Br. p. 5.) In the face of the express 30-day grace period allowed by the statute and incorporated by the valid union-security agreement negotiated between the Company and the Union to meet the "free riders" problem of "employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to the union" (Board's Br. p. 6),

how can the Board legally justify excusing Balthrope's breach of that agreement and converting his discharge into an unfair labor practice?

By laying great stress upon the fact that the Union "demanded no more than the payment of the initiation fee" without requiring that he "pay or tender, in addition to initiation fees, dues that would have been payable if he had joined the Union when first asked," the Board's majority [R. 63] and the General Counsel (Board's Br. p. 7, fn. 4) demonstrate an arbitrary and unwarranted disregard of the true nature and significance of a union initiation fee requirement, as distinguished from the requirement of paying dues after membership has been completed.

The Trial Examiner, on the other hand, recognized that by failing to pay the regular initiation fee *within 30 days,* Balthrope was "guilty of an omission with respect to the very first step required of him under a valid union-security clause." [R. 44.]

This "fundamental distinction between initiation fees and dues" was well-sumarized by the dissenting Board members, when they wrote [R. 73] that—

> "Under a union shop clause, like the one here involved, an employee has the successive contractual obligations of first acquiring and then retaining membership; the payment of initiation fees is the price of acquiring membership while the payment of dues is the price of retaining it. *The obligation to pay dues does not normally accrue until after membership has been acquired* . . . Balthrope escaped the payment of four months' dues by his belated tender of initiation fee and to that extent he was a 'free rider' on the day of his discharge." (Emphasis added.)

"No issue has ever been raised in this litigation as to Balthrope's liability for dues" (Board's Br. p. 7, fn. 4) and "there was no demand for such dues" [R. 63], because none of the obligations of union membership, including liability for payment of "periodic dues", arises until *after* the non-union employee has applied for membership and paid his initiation fee. The General Counsel is in error when he suggests (Board's Br. p. 7, fn. 4) that "The Union may well have a claim against him [Balthrope] for dues", if reference is thus being made to the period before acceptance of his belated tender of the initiation fee and membership application.

Once an employee becomes a member of the Union, upon making application therefor and paying the required initiation fee, he becomes subject to the obligations and responsibilities of membership as provided by the Union's Constitution and By-Laws, including liability for the payment of "periodic dues". These membership obligations are part of the contractual arrangements between the member and the organization contained in the Union Constitution and By-Laws which are recognized by the civil law. Thus, apart from the amended National Labor Relations Act and apart from any collective bargaining agreement, membership dues obligations may be enforced at law in the same manner as any other debt under a contract.

The legal rights, obligations, and status of a non-member on the one hand and a dues-delinquent member of a Union on the other hand are quite different. A dues-delinquent suspended member has in the past indicated a willingness to join and belong to the organization; has incurred certain legally enforceable financial obligations to the organization; and, depending upon the particular Union constitution and by-laws, may have certain rights to regain membership in good standing upon the belated payment of back dues and reinstatement fees. A dues-delinquent expelled member likewise has indicated past willingness to

join and belong to the organization; has incurred certain legally enforceable financial obligations to the organization, and may even still possess a right to reinstatement under certain conditions.

A non-member who fails to make application for membership and to tender initiation fees has never indicated a past willingness to join and belong to the organization; has never incurred any legally enforceable or other financial obligations to the organization, and never having achieved membership in good standing, cannot be "reinstated" to it by belated financial payments.

A non-member of a Union who has not paid any initiation fee is under no financial duty or obligation to the labor organization. He is not bound by the Constitution and By-Laws of the Union as a matter of contractual liability. The Union cannot sue such a non-member for non-payment of initiation fees, or periodic dues, or financial payments of any kind. As time passes, the non-member does not become increasingly liable for "periodic dues" since he never became liable for any dues payments at all.

A member of a Union who has applied to join the organization and paid any required initiation fee is under an express duty or obligation to make financial payments of various kinds to the labor organization. He is bound by the Constitution and By-laws of the Union as a matter of contractual liability and may be sued civilly for non-payment of dues, fees, fines and assessments. He usually may be suspended or expelled from membership for various reasons, including, but not limited to non-payment of financial obligations. He usually may be suspended or expelled from membership for non-payment of fees, fines and assessments as well as for non-payment of "periodic dues". Payments of "periodic dues" usually may be refused where accumulated fees, fines and assessments remain unpaid, or else sums tendered for "periodic dues"

may be applied by the Union to meet other delinquent obligations rather than credited to the satisfaction of his dues obligations. As time passes, a dues-delinquent member becomes increasingly liable for additional "periodic dues", at least until he is actually expelled from membership.

Congress has thus recognized, in Section 8(b)(5) of the statute, that payment of the initiation fee to a labor organization on the part of "employees covered by an agreement authorized under subsection (a)(3)" is usually "a condition precedent to becoming a member of such organization."

Balthrope was indisputably a "free rider" without any of the financial obligations of union membership for "periodic dues" for over 4 months after the effective date of the valid union-security agreement, by reason of his deliberate failure to tender any initiation fee, even though he was made aware of the requirement of union membership after 30 days as a condition of continued employment, shortly after the contract was signed. The Board's majority and the General Counsel insist that Balthrope could not be lawfully discharged under Section 8(a)(3) even though he did not offer to become a member of the Union until more than 3 months after the expiration of the 30 day grace period specified therein.

We submit that this is not "the financial protection Congress intended" when it concededly recognized in the proviso to Section 8(a)(3) that "a union operating under a union security agreement is entitled to financial support by all who enjoy the benefits of the contract" and "may *effectively* insist upon such support." (Board's Br. p. 7.)

B. The Legislative History.

In the instant case, the majority of the Board apparently ignored the Congressional Committee reports and legislative debates which were relied upon by the dissenting Board members [R. 72] and the Trial Examiner [R. 46-51] when they rejected the General Counsel's contention,

with respect to the allegedly unlawful character of Balthrope's discharge, as being "contrary to the legislative mandate." [R. 51.]

The Board's brief herein (pp. 4-5) makes passing references to the derivation of the more limited form of union-security allowed by Congress in Sections 8(a)(3) and 8(b)(2) of the "Taft-Hartley Act" from the provisions of Section 8(3) of the "original Wagner Act", permitting an employer and the labor organization representing his employees to enter into an agreement making union membership a condition of employment. It also (pp. 6-7) cites and quotes from the *Radio Officers' Union* decision of the Supreme Court (347 U. S. 17, *supra*) which generally refers to the legislative history of Section 8(a)(3) to indicate how "Congress recognized the validity of unions' concern about 'free riders'. . . ."

A more detailed examination of the legislative history of the union shop proviso to Section 8(a)(3), such as the careful analysis made by the Trial Examiner herein, plainly demonstrates that Congress "intended to give unions the right to insist upon timely submission of uniformly required initiation fees." [R. 48.]

The legislative debates and reports contain no support for the majority decision of the Board which necessarily implies the existence of Congressional intent that payments of initiation fees, many months after the expiration of the 30-day grace period prescribed by Section 8(a)(3), have to be treated as proper tender and timely under a valid union-security agreement.

If the Board's construction of Section 8(a)(3) invalidating Balthrope's discharge under the circumstances of this case was accurate, what then did the House Committee on Education and Labor mean when it reported on April 11, 1947, that the Hartley bill (H. R. 3020, 80th Cong. 1st Sess.) "permits an employer and a union voluntarily to enter into an agreement requiring employees

to become and remain members of the union a month or more after the employer hires them or after the agreement is signed", so that *"Employees have 30 days to decide whether or not to join the union"?* [House Report No. 245, 80th Cong., 1st Sess., pp. 9 and 34, quoted by the Trial Examiner herein at R. 48.]

What then did the majority of the Senate Committee on Labor and Public Welfare mean when it reported on April 17, 1947, that under Sections 8(a)(3) and 8(b)(2) of the Taft bill (S. 1126, 80th Cong., 1st Sess.) "employers would still be permitted to enter into agreements *requiring all the employees in a given bargaining unit to become members 30 days after being hired"?* [Senate Report No. 105, 80th Cong., 1st Sess., p. 7, cited by the Trial Examiner herein at R. 48. Emphasis added.]

What then did the late Senator Robert A. Taft mean on April 23, 1947, when he declared that under a permissible union shop agreement *"the employer binds himself not to continue anyone in employment after the first 30 days unless he joins the union",* and that *"after 30 days such employee has to join the union or else the employer can no longer employ him"?* [93 Cong. Rec. 3952, also quoted at R. 48 herein.]

What then did Senator Smith of New Jersey mean on April 30, 1947, when he stated that "We provide in our bill for the so-called union shop. That is to say, the employer can employ anyone he desires to employ, but *within 30 days after employment the employee must join the union. . . .*"? [93 Cong. Rec. 4412-4413, partially quoted at R. 49.]

What then did Senator Taft mean on May 9, 1947, (when the proposed Ball-Byrd amendment abolishing the union shop was defeated in a Senate vote of 57 to 21), by his declaration that *"the employee must join the union within 30 days after he is employed",* so that "a man can get a job without joining the union or asking favors of

the union and *once he has the job he can continue in it for 30 days. . . .*"? On that same date what did Senator Thye of Minnesota mean when he informed Senator Donnell of Missouri that "the employer can hire any man from any walk of life", but *"after he has been in the plant 30 days he must become a qualified member of the union in order to remain on the payroll"?* And why was there no challenge to Senator Donnell's remarks during this same debate on May 9th when he said that "the employer makes an agreement that he will not employ anyone who does not join a union within 30 days after he commences employment"; "the man will have 30 days more in which to join the union"; *"a man will not be able to hold a job under a contract of the sort we have discussed, unless within 30 days after he takes the job he joins the union, although he may not wish to join it at all";* and "he cannot retain a job after he once gets it unless he joins an organization within 30 days"? And also why did Senator Taft stress the importance of the 30-day grace period by stating that, "The fact that the employee will have to pay dues to the union seems to me to be much less important", followed by Senator Donnell's immediate reply that "I do not regard the payment of dues as the important point at all"? [93 Cong. Rec. 5087-5091, quoted in part at R. 49-50 herein.]

What then did Senator Ball of Minnesota mean when he told the Senate on May 12, 1947, that the Taft bill permits union shop clauses under which *"the employee must join the union within 30 days after going to work"?* (93 Cong. Rec. 5147.)

According to the Conference Report on the Taft-Hartley Act, (Public Law 101, ch. 120, 80th Cong. 1st Sess., 61 Stat. 136) as finally adopted, Sections 8(a)(3) and 8(b)(2) permit discharges and attempts to cause discharge of non-union employees "under the terms of a permitted union shop or maintenance of membership

agreement", *i.e.* an agreement "whereby the employer agrees that he will employ only employees who on and after thirty days from the date of their employment (or from the date of the agreement, if that is later) are members of the labor organization concerned." [House Conference Report No. 510, dated June 3, 1947, 80th Cong., 1st Sess., pp. 41 and 44; partly quoted by the Trial Examiner herein at R. 47.]

In the Board's brief (pp. 6-7), the General Counsel concedes that Congress, in permitting a limited area in which employees could be discharged under the terms of a union security agreement, was concerned with protecting a union against "free riders". The Board's majority likewise cited the *Radio Officers* case, *supra,* 347 U. S. 17, 40-41, confirming the Congressional intent, expressed in the proviso to Section 8(a)(3), to permit "the utilization of union security agreements" to "compel payment of dues and initiation fees". [R. 63, fn. 4.]

In the face of these conceded Congressional purposes, the General Counsel argues that the Board majority was correct when it found [R. 63] that "from the moment" Balthrope belatedly tendered his initiation fees *more than 3 months after the 30-day grace period had expired,* "he could no longer be deemed a 'free rider'." (Board's Br. p. 7.) Such an argument suggests that a non-union employee is legally entitled to be a "free rider" for four months, or for any period of time no matter how unreasonable, so long as he tenders his initiation fees between the time that the Union requests his discharge and the date when the Employer actually discharges him. The result of this decision is to render nugatory and unenforceable, in practice, the 30-day time limitation provided by contracts written as authorized by statute.

Such an interpretation of the legislative history of Sections 8(a)(3) and 8(b)(2) is contrary to that of the Supreme Court of the United States in the cited case to

the effect that "an employer can discharge an employee for non-membership in a union if the employer has entered into a union security agreement valid under the Act with such union and if the other requirements of the proviso are met." (*Radio Officers* case, *supra*, 347 U. S. at p. 41.)

Apart from the majority status of a bona fide union which has complied with Sections 9(f), (g) and (h), as in the present case, what are these remaining "requirements of the proviso" to Section 8(a)(3) of the Act which must be met? They are availability of union membership "on the same terms and conditions generally applicable to other members" and the absence of reasons for denial or termination of union membership other than "failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership."

What were the purposes of Congress in prohibiting discharge of employees in cases where the employer has reason to believe that these latter "requirements of the proviso" are not being observed by the Union?

According to the majority of the Senate Committee, they were *"to protect the employee in his job if unreasonably expelled or denied membership."* (Senate Report No. 105, 80th Cong., 1st Sess., p. 20.) This Senate Committee Report states at the page just cited:

> "Section 8(a)(3): The proviso to this section has been redrafted to abolish what is narrowly termed the 'closed shop'. An employer is permitted to make agreements requiring membership in a union as a condition of employment applicable to employees in a given bargaining unit 30 days after an employee is hired. . . . Under another proviso of this subsection, it becomes an unfair labor practice for an employer to discharge an employee under a compulsory membership clause if he has reasonable grounds for believing (A) that membership was not

available to the employee on equal terms with other members (B) that membership in the union was terminated for reasons other than non-payment of regular dues and initiation fees."

Senator Taft specifically clarified the purpose of this second proviso relating to the union shop during Senate debate on the measure (93 Cong. Rec. 3953; Emphasis added), when he explained:

> "[W]e have proposed a proviso in the case where a man is refused admittance to a union, when an employer employs a non-union man and *during the first 30 days of his employment he goes to the union and says 'I want to join the union'*, but the union refuses to take him. It is provided that in such case the *employer shall not be compelled to discharge the man simply because the union will not let him join the union* on the same terms and conditions as any other member . . .
>
> "The bill further provides that if the man is admitted to the union, and subsequently is *fired from the union for any reason other than nonpayment of dues,* then the employer shall not be required to fire that man. In other words *what we do, in effect, is to say that no one can get a free ride in such a shop.* That meets one of the arguments for the union shop. The employee has to pay the union dues. . . . Under this bill the employer would not have to fire that man unless he did not pay his dues."

In the light of the foregoing statement by the co-author of the legislation which speaks separately of the case where a non-member applies for union membership *"during the first 30 days of his employment"* and the case where "the man is admitted to the union and *subsequently* is fired from the union . . . for non-payment of dues," the General Counsel cannot support his claim that no

distinction was made by Congress between the requirements of "becoming" and "remaining" a union member. When Senator Taft declared that "no one can get a free ride in such a shop" he certainly did not exclude an employee like Balthrope who failed and refused to approach the Union with an offer to join "during the first 30 days of his employment" under the valid union shop contract even though the Union was prepared to let him join "on the same terms and conditions as any other member".

As finally adopted, Section 8(a)(3) simply "prohibits an employer from discriminating against an employee by reason of his membership or non-membership in a labor organization, except to the extent that he obligates himself to do so under the terms of a permitted union shop or maintenance of membership agreement" and Section 8(b)(2) merely "prohibit(s) all attempts by a labor organization or its agents to cause an employer to discriminate against an employee in violation of Section 8(a)(3)". (House Conference Report No. 510, 80th Cong., 1st Sess., p. 44.)

From the foregoing analysis of the legislative history, it is clear that Congress intended that:

(1) The employer should be free to hire new employees and to retain old employees without regard to membership or non-membership in the union, during a 30-day grace period.

(2) During such 30-day grace period extended to each employee, union membership should be available to him on a non-discriminatory basis and he must determine whether to join the union or submit to the risk of discharge.

(3) At the expiration of the 30-day period, the employee must have offered to *become* a member of the Union by tendering his uniformly required initiation fee and thereafter must offer to *remain* a member of the union during the term of the union

security agreement by tendering his "periodic dues", or else be subject to termination of his tenure of employment.

As Senator Ball put it (93 Cong. Rec. 5147, emphasis added):

> "The bill outlaws completely the closed shop under which an employee must become a member of the union before he can be employed. It permits the union shop under which the employee must join the union within 30 days after going to work . . . and even when it is negotiated on that basis the employer cannot fire a man if he is *denied membership in the union or expelled from the union* for any reason other than nonpayment of regular dues and initiation fees."

C. Legislative Policy Favoring Traditional Union Shop Practices in the Field of Industrial Relations.

In rejecting "the General Counsel's contention, now advanced, that the 8(a)(3) proviso and Section 8(b)(2) permit employees hired under a valid union security agreement to disregard, with impunity, its uniformly applicable requirements with respect to the timely payment of initiation fees" [R. 52], the Trial Examiner noted that, apart from the "clear expression of Congressional intent" just discussed, *"sound practice in the field of industrial relations" as reflected in numerous arbitration cases* reveals a consensus that the result sought to be enforced herein by the decree of this Honorable Court of Appeals would "materially detract from the substance of union security agreements and leave individual employees free to ignore an important membership condition, which unions are permitted to impose". [R. 52-54.]

"The application of the General Counsel's theory in the present case" would not "effectuate the legislative

intent" to promote industrial stability by permitting a limited form of union security. The General Counsel, on the contrary, seeks to establish in this case "a precedent under which valid and legal union-security agreements could be rendered nugatory and unenforceable, in practice, by the unilateral decision of the employers involved to delay compliance with their terms" and at least "would permit the unilateral extension, by employers of contractually established deadlines for the tender of uniformly required initiation fees by the non-union employees in a contract unit". [R. 55.] As the dissenting Board members so aptly described it [R. 73], under such a precedent declaring that "belated payments of initiation fees at any time prior to discharge are regarded as timely", a non-union employee "is permitted to profit by his own dereliction at the expense of the Union by being relieved of payment of the periodic dues which would have accrued had he timely paid his initiation fee".

The legislative history of Sections 8(a)(3) and 8(b)(2) clearly demonstrates, as noted previously, that Congress intended to preserve and maintain rather than to defeat and destroy these historical practices under union-shop agreements which in its opinion had materially contributed over the years to industrial relations stability.

Thus, the Senate Committee majority report points out (Senate Report No. 105, 80th Cong., 1st Sess., p. 7; emphasis added) that "Under the amendments which the committee recommends, *employers would still be permitted to enter into agreements requiring all the employees in a given bargaining unit to become members 30 days after being hired"*, so that "these amendments remedy the most serious abuses of compulsory union membership and yet *give employers and unions who feel that such agreements promoted stability by eliminating 'free riders' the right to continue such arrangements"*.

Similarly, during the debates, Senator Taft, as co-author of the measure, doubly emphasized that:

> "I have hesitated to support the complete outlawing of the union shop, because the union shop has been in force in many industries for many years and to upset it today would destroy relationships of long standing and probably would bring on more strikes than it would cure." (93 Cong. Rec. 3953.)

> "We considered the arguments very carefully in the committee and I myself came to the conclusion that since there had been for such a long time so many union shops in the United States, since in many trades it was entirely customary, and had worked satisfactorily, I at least was not willing to go to the extent of abolishing the possibility of a union shop contract. . . ." (93 Cong. Rec. 5087 *et seq.*)

Again, Senator Smith of New Jersey resorted to existing industrial relations practices and cited actual contracts to illustrate "the kind of union shop which I think is thoroughly justified" because it "will give those workers who have not yet joined an opportunity to voluntarily become members of the union and to assume their share of the responsibility for the constructive work of the union." (93 Cong. Rec. 4412-4413.)

Section 8(a)(3) expressly provides that "Nothing in this Act, or in any other statute of the United States shall preclude an employer from making an agreement with a labor organization" containing a valid union shop clause.

In 1947, Congress thus deliberately chose to retain a limited form of union security in order to carry out the public policy announced in Section 1 of the Act, as amended, of promoting industrial stability by *"encouraging the practice and procedure of collective bargaining"*.

In 1951, this "choice by the Congress of the union shop as a stabilizing force" in labor-management relations was again made in adopting the union shop amendment to the Railway Labor Act (Section 2, Eleventh, 64 Stat. 1238, 45 U.S.C., Sec. 152, upheld in *Railway Employees' Dept., AFL v. Hanson,* 351 U. S. 225.)

The right of employees to refrain from joining labor organizations under the Taft-Hartley Act was expressly limited by Congress "to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)". (Section 7 of the amended National Labor Relations Act.)

Congress further indicated its intention to make collective bargaining agreements *binding and enforceable* by creating a legal obligation of both employers and unions for "the execution of a written contract incorporating any agreement reached if requested by either party" (Section 9(d) of the amended National Labor Relations Act) and authorizing the Federal courts to entertain "suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce" regardless of the amount in controversy or citizenship of the parties. (Section 301 of the Labor Management Relations Act, 1947.)

The Trial Examiner correctly considered "the usual practices of employers and unions in the administration of union-security contracts" and "the applicable policy considerations" in concluding that it would not "effectuate the statutory objectives" to adopt a construction of the statute which would turn the 30-day grace period specified in Section 8(a)(3) and duly incorporated into thousand of collective bargaining agreements into a precatory provision which might be wilfully disregarded by non-union employees and deliberately breached by anti-union employers with impunity. [R. 56.]

D. The Rule Against "Administrative Legislation" by the Board.

Until the second Board decision in the *Aluminum Workers International Union* case (112 N.L.R.B. 619, decided May 6, 1955), and the present *Technicolor Motion Picture Corporation* decision (115 N.L.R.B. 1607, decided June 21, 1956), the National Labor Relations Board accepted and followed without deviation, the legislative mandate of Congress which established a specific *"30-day grace period* for all employees who are not members of the Union" under valid union-security agreements. (Board's Nineteenth Annual Report, p. 91; Eighteenth Annual Report, p. 39; Seventeenth Annual Report, pp. 147-149; see also Board's Sixteenth Annual Report, pp. 65-66.)

In its annual reports to the Congress (prior to these two decisions), the Board confirmed its acceptance of the statutory policy permitting the discharge of an employee under such a valid union-security agreement, for lack of union membership if such non-membership "results from his failure to tender *on time* 'the periodic dues and initiation fees uniformly required.'" (Board's Nineteenth Annual Report, p. 90; Eighteenth Annual Report, p. 41; Seventeenth Annual Report, pp. 147 and 152; Sixteenth Annual Report, p. 185.)

In cases, which were unlike the instant proceeding, in that the evidence affirmatively disclosed that failure to make a *timely tender* of the required financial payments was *not* the proximate cause of the discharge of the non-union employee, the Board, of course, repeatedly held that the union shop proviso of Section 8(a)(3) could not be relied upon to justify the prohibited discrimination. Leading examples of such distinguishable cases may be found:

> (1) where the Union improperly rejected an attempted tender properly made within the 30-day grace period (*Matter of Local 1139, United Elec-*

trical Workers, 114 N.L.R.B., No. 202; *Matter of Aluminum Workers International Union, Local No. 135, A.F.L.,* 111 N.L.R.B., No. 63, enf'd 230 F. 2d 515; *Matter of Baltimore Transfer Co.,* 94 N.L.R.B. 1680; *Matter of Parker Pen Co.* (*Pen and Pencil Workers Union*), 91 N.L.R.B. 883; see also *Matter of Von's Grocery Company,* 91 N.L.R.B. 504);

(2) where the Union accepted an adequate tender within the 30-day grace period but then improperly failed to credit the dischargee with such payment (*Matter of Great Atlantic and Pacific Tea Company,* 110 N.L.R.B. 918; *Matter of Ferro Stamping and Manufacturing Company,* 93 N.L.R.B. 1459; *Matter of Electric Auto-Lite Company,* 92 N.L.R.B. 1073, enf'd 196 F. 2d 500);

(3) where the Union would not have made membership available on equal terms if tender had been timely made or where it requested discharge after it denied or terminated membership for reasons other than failure to make timely tender (*Matter of Local 1139, United Electrical Workers, supra,* 114 N. L. R.B., No. 202; *Matter of Teamsters, Local 169,* 111 N.L.R.B. 460, enf'd 228 F. 2d 1425; *Matter of Victor Metal Products Corp.,* 106 N.L.R.B. 1361; *Matter of Kingston Cake Co.,* 97 N.L.R.B. 1445; *Matter of Eclipse Lumber Co., Inc.,* 95 N.L.R.B. 404, enf'd 199 F. 2d 684; see also *Matter of Custom Underwear Mfg. Co.,* 108 N.L.R.B., No. 24; *Matter of Roadway Express, Inc.,* 108 N.L.R.B., No. 123; *Matter of Pape Broadcasting Co.,* 104 N.L.R.B., No. 2);

(4) where the Union took a position which would have rendered a timely tender "futile" or itself prevented the making of a timely tender by misrepresentations or concealment of the union-security re-

quirements of the contract. (*Matter of Busch-Kredit Jewelry Co., Inc.,* 108 N.L.R.B. 1214; see *Matter of Bloomingdale's,* 107 N.L.R.B. 191, enf. den. 216 F. 2d 285; *Matter of Eclipse Lumber Co.,* 95 N.L.R.B. 464; *Matter of Baltimore Lumber Co., supra,* 94 N.L.R.B. 1680; *Matter of Kaiser Aluminum & Chemical Corp.,* 93 N.L.R.B. 1203.)

The above-cited Board decisions (with one exception discussed below) were consistent with the established legal rules of tender under the law governing ordinary business or commercial transactions. These rules excuse a "failure to tender" by a party whose contract right is subject to the condition precedent of payment, where the requirement of a formal tender is obviated by the acts of the other party, as by his (1) *waiver of tender;* (2) *acquiescence in non-tender;* (3) *express refusal in advance to comply with reciprocal terms of the contract;* (4) *evasion of the party seeking to make tender;* (5) *deception of the party seeking to make tender;* (6) *rejection of the tender upon an insufficient ground, etc.*

In the present initiation fee case the Trial Examiner correctly found that there was no evidence of any conduct by the Company or the Union amounting to such waiver, acquiescence, estoppel, misrepresentation, or other "special circumstances comparable to those dealt with in the dues delinquency cases" as would be "sufficient to warrant the imposition of a statutory sanction against the enforcement of a valid union-security clause" by the Board's "equitable interpretation" of its Congressional mandate. [R. 45.]

Here the Union did not reject or fail to credit an attempt by the dischargee to make tender of his initiation fee within the 30-day grace period for insufficient reasons, but rather Balthrope completely failed to make any tender at all until more than 3 months after the deadline specified in the contract. [R. 19.]

Here, the Union did not refuse to make membership available to Balthrope on equal terms, but rather offered him membership upon payment of the "initiation fee uniformly required," which was "the only sum which the Union asked or required of Balthrope" in connection with his membership application. [R. 20.]

Here, the Union did not request Balthrope's discharge after denying him membership or terminating his membership for reasons other than his failure to make timely tender, but rather demanded his discharge only after Balthrope failed to tender his initiation fee within the 30-day grace period afforded him by the valid union-security provision of the contract, doing so specifically "for his failure to tender the periodic dues and initiation fees uniformly required." [R. 7 and 19.]

Here, the Union did not take a position which would have rendered a timely tender "futile," but rather "approved Balthrope's application for union membership" and "secured another position for him . . . at comparable wage rates" within a reasonable time after he first made application for union membership accompanied by his check for the initiation fees. [R. 20.]

Finally, it should be noted that here the Union and the Company did not do anything to prevent the making of a timely tender by misrepresentation, concealment, or otherwise, but rather Balthrope learned of the existence of the union-security agreement and its specific requirements from management and other sources shortly after the execution of the contract. [R. 18-19.]

Since the Union did not (1) request Balthrope's discharge for any reason other than his "failure to tender" within the 30-day grace period established by the contract; (2) impose any special term or condition for making membership available to him not generally applicable to other members; nor (3) deny or terminate Balthrope's membership for any reason, the Company certainly did

not have "reasonable grounds for believing" that any of the proscribed acts had been committed which would prevent it from justifying Balthrope's discharge for non-membership in the Union under Section 8(a)(3).

The General Counsel conceded before the Board in this case that the only issue was the legal sufficiency of a belated tender of initiation fees, since there was "no question of the background; whether the charging party acted in good faith; whether there was a reason for his delinquency; whether there was actually a waiver by the union of such delinquency." [R. 74, fn. 11.]

Prior to the second *Aluminum Workers* decision and the instant *Technicolor* decision, *supra,* the Board repeatedly upheld the discharge of employees pursuant to the terms of a valid union security agreement if no substantial evidence existed in the record indicating that the dischargee had a legally justifiable excuse for his "failure to tender" within the specified grace period, based upon the discriminatory conduct of the Union or the Employer or both. (*Matter of Krambo Food Stores,* 106 N.L.R.B. 870; *Matter of Kuner-Empson Company,* 106 N.L.R.B. 670; *Matter of National Lead Co.,* 106 N.L.R.B. 545; *Matter of Air Reduction Co., Inc.,* 103 N.L.R.B. 64; *Matter of Al Massera, Inc.,* 101 N.L.R.B. 837; *Matter of North American Refractories Co.,* 100 N.L.R.B. 1151; *Matter of Food Machinery and Chemical Corp.,* 99 N.L.R.B. 1430; see also *Matter of Kaiser Aluminum & Chemical Corp.,* 98 N.L.R.B. 753; *Matter of Standard Brands, Inc.,* 97 N.L.R.B. 737; *Matter of Chisholm-Ryder Co.,* 94 N.L.R.B. 508; see also *Matter of Ferro Stamping & Mfg. Co.,* 93 N.L.R.B. 1459; *Matter of Firestone Tire and Rubber Company,* 93 N.L.R.B. 981.)

After making the rulings in the just-cited cases upholding the statutory requirement of *timely tender* in order to effectively forestall discharge under a valid union security agreement, the Board unsuccessfully attempted to

substitute its judgment for that of Congress by a decision which the United States Court of Appeals for the Second Circuit called *"an unduly legalistic implementation of the broad policies of the Labor Management Relations Act."* (*National Labor Relations Board v. Local 3, Bloomingdale, etc. Department Store Union, C.I.O.* (C. A. 2nd, 1954), 216 F. 2d 285, denying enforcement of *Matter of Bloomingdale's, supra,* 107 N.L.R.B. 191.)

In the *Bloomingdale's* case, the dischargee "joined the union only reluctantly at the last moment of a grace period" and thereafter "was recurrently delinquent in his dues." About a year before his subsequent discharge, the Union fined the employee for his unexcused absence from compulsory union meetings. Thereafter, the union accepted one dues payment by mail, but rejected personal tender of three later dues payments because they were unaccompanied by the amount of the outstanding fines. The employer failed to comply with "persistent union demands" for the employee's discharge, until several months later when the union agreed to accept his dues without payment of fines. Following receipt of notice by the Employer's personnel manager that the union was no longer requiring settlement of the fines before it would accept his dues and after being urged to make another tender, the employee's attitude was one of "obdurate recalcitrance." The employee refused to make the necessary tender. The employer discharged him the next day for non-payment of union dues.

In a resulting consolidated unfair labor practice proceeding, the Trial Examiner upheld the employer's discharge of its employee as valid under Sections 8(a)(1) and 8(a)(3) and the union's request for such discharge as valid under Sections 8(b)(1) and 8(b)(2) of the amended Act. Although "absolving the employer from complicity," the Board, with one member dissenting, reversed the Trial Examiner, and found the union guilty

of unlawfully causing the questioned discharge because it failed to first specifically notify the dischargee that his dues would be accepted without payment of fines. The union was ordered to cease and desist from causing the employee's discharge under the union-security agreement, to acquiesce in the dischargee's reinstatement, and to compensate him for lost pay.

In declining to enforce the Board's order, the Circuit Court, speaking through Chief Judge Clark with the concurrence of Circuit Judges Learned Hand and Frank, held that the agency could not require, "as a prerequisite of law" that notice of adaptation of union policies to the legal requirements of the union-security clause of its contract must be directly communicated to the delinquent employee in order to be binding upon him.

Declaring that "Congress did not intend the Board's policing of union unfair labor practices to encompass general supervision of intraunion administration," the Second Circuit ruled that as a matter of law the employee "had the choice of testing the union's sincerity by a tender or of taking the major risk of discharge."

The Board's majority in the *Bloomingdale's* case, like the Board's majority in the instant case, failed to heed the judicial admonition of the Supreme Court of the United States that the enforceability of the obligations of a valid union-security contract expressly authorized by the National Labor Relations Act may not be impaired by an administrative exception or modification, regardless of policy considerations. [*Colgate-Palmolive Peet v. N.L.R.B.*, 338 U. S. 355, quoted by the Trial Examiner herein at R. 51.]

In the *Colgate-Palmolive Peet* case, the Supreme Court plainly charged the Board that—

> (1) ". . . the policy of Congress . . . cannot be defeated by the Board's policy, which would

make an unfair labor practice out of that which is authorized by the Act."

(2) "The Board cannot ignore the plain provisions of a valid contract made in accordance with the letter and the spirit of the statute and reform it to conform to the Board's idea of correct policy."

(3) The Court will not "sustain the Board's contention" if to do so "would be to permit the Board under guise of administration to put limitations in the statute not placed there by Congress."

By arbitrarily extending the 30-day time limitation fixed by Congress for the grace period required in valid union-security agreements, the Board's majority in this case has engaged in quasi-judicial legislation under the guise of administration, which both exceeds its authority under the statute creating the agency and violates the basic constitutional principle of separation of powers.

If Congress wishes to extend the limits of the 30-day grace period required before union membership can be enforced as a contractual condition of employment under the Taft-Hartley Act, it will do so by an appropriate amendment to the legislation, just as it amended Section 8(3) of the 1935 Wagner Act in 1947 to outlaw "closed shop" agreements not containing any 30-day grace period, and just as it amended the 1926 Railway Labor Act in 1951 to permit "union shop" contracts with a 60-day grace period. This does not mean that the Board is free to "amend" the statute by making unauthorized and distorted interpretations of its explicit provisions.

E. Established Legal Rules Governing Time of Tender.

In interpreting and applying the language of Sections 8(a)(3) and 8(b)(2) which both speak of the employee's failure *"to tender* the periodic dues and the initiation fees uniformly required as a condition of acquiring or retain-

ing membership," the opinion of Circuit Judge Lindley in *N.L.R.B. v. Aluminum Workers Union, supra,* 230 F. 2d 515, which is the principal authority relied upon by the General Counsel herein (Board's Br. pp. 7-9) expressly recognized that—

> (1) ". . . the exception provided for in the statute to effectuate a means for enforcement of maintenance of membership clauses has been drawn by Congress in terms of the established legal principle of tender."
>
> (2) "Since the word is not otherwise defined in the Act, we must accord to it its well established meaning."
>
> (3) Since "the doctrine . . . developed in the law governing business and commercial relationships can be as easily and as logically applied to any situation requiring the payment of money by one person to another; we are bound by the language of the Act to accord to the word 'tender' its well established legal connotation."

When commenting upon the Trial Examiner's Intermediate Report, neither the Board's majority in its decision [R. 62-63] nor the General Counsel in the Board's brief herein (p. 4) specifically challenge or otherwise meet directly the legal conclusions found therein regarding the well established legal principles governing *time of tender* under the law of contracts. [R. 52-53.]

The leading treatises in the field of contract law relied upon by the Trial Examiner herein (*Williston on Contracts* VI, Sec. 1810; *Restatement of Contracts,* Sec. 276) outline these well established principles by indicating:

> (1) A tender, to be effectual must be made within the time fixed by law or by contract as the case may be.

(2) Timely performance is a condition of an effective tender where the time of performance is expressly designated as essential or the nature of the agreement involved is such as to make performance at the time or within the period specified of vital importance.

(3) Time for the payment of money may be made of the essence, as in the case of any other obligation, by an express provision on the subject or by the nature of the agreement.

(4) Even where time is of the essence, delay in tender may be waived or otherwise excused by the prevention of timely performance by the party entitled to receive the tender.

The Trial Examiner and the dissenting Board members reached the conclusion in the present case, based upon "a careful analysis of the legislative history, the literal language of the Act and the contract" that the statute clearly permits agreements making "time of the essence" in regard to the initiation of union membership within the 30-day grace period by tender of regular initiation fees [R. 52, 72] and the language of the valid union-security agreement expressly requires that union membership must be thus acquired by the employees comprising the contract unit within the limits of the 30-day grace period specifically set forth therein. [R. 53, 71.]

Applying the recognized general law of tender to these circumstances, as the language of the amended Act requires, the Trial Examiner and the dissenting Board members necessarily concluded that, in the absence of any waiver by the Union of the 30-day time limit [R. 40 and 74] or other special circumstances [R. 45 and 51], an employee who fails to timely tender his initiation fee in accordance with the terms of such a lawful union-security agreement may be lawfully discharged notwithstanding a prior belated tender.

II.

The Dissenting Board Members and the Trial Examiner Correctly Distinguished the Aluminum Workers Decision From the Present Case.

"In the instant case, the contention of the General Counsel with respect to the unfair labor practices attributed to the Respondent Company and the Union rests squarely upon the agency's pronouncement in the *Aluminum Workers* case," (112 N.L.R.B. 619), and the record of the proceedings below discloses that "his representative, indeed, expressly disclaims reliance upon any alternative theory." [R. 37.]

The Board's majority expressed "the opinion that the principle enunciated in the *Aluminum Workers* case is applicable to the particular facts herein." [R. 63.] It reversed the Trial Examiner's conclusion that this Board holding was distinguishable from a case like the instant one involving the belated payment of an initiation fee after the expiration of the 30-day grace period. [R. 62.]

In urging this Honorable Court of Appeals to enforce the Board's order, the General Counsel insists that the decision of the Seventh Circuit in *N.L.R.B. v. Aluminum Workers Union*, 230 F. 2d 515, cited on several issues as his principal authority, is "squarely in point." (Board's Br. pp. 7-9.)

Respondent Company and Union respectfully submit that the extension of the *Aluminum Workers* doctrine concerning belated tender of periodic dues to convert Balthrope's discharge for failure to timely tender his initiation fee into an unfair labor practice is unwarranted as a matter of law, and, therefore, the Trial Examiner and the dissenting Board members correctly concluded that the *Aluminum Workers* case is not here controlling. [R. 43-46, 72-73.]

A. The Fundamental Distinction Between Initiation Fees and Dues.

As noted previously, payment of a labor union's initiation fee by a non-member employee is "the very first step required of him under a valid union-security clause" [R. 44], which is ordinarily "a condition precedent to becoming a member of such organization." (Sec. 8(b)(5), 29 U.S.C., Sec. 158(b)(5).)

"The obligation to pay dues [which is the price of 'retaining' union membership], does not normally accrue until after membership has been acquired" and "the payment of initiation fees is the price of acquiring membership." [R. 73.]

The amended National Labor Relations Act specifically provides that an employee covered by an agreement authorized by Section 8(a)(3) may not be required to possess union membership before *"the thirtieth day"* following the beginning of his employment under the contract or its effective date, whichever is the later.

After the expiration of the 30-day grace period, he may be lawfully discharged "for failure to tender . . . the initiation fees uniformly required as a condition of acquiring . . . membership" (Sec. 8(a)(3)), but may not be required to pay such an initiation fee "in an amount which the Board finds excessive or discriminatory under the circumstances." (Sec. 8(b)(5), relating only to fees charged for becoming a union member, but *not* to dues charged for remaining a member.)

While Section 8(a)(3) thus clearly establishes when a non-member employee may be discharged for failure to timely tender initiation fees, the statute is silent or at least subject to interpretation as to when a non-member employee may be discharged "for failure to tender the periodic dues . . . uniformly required as a condition of . . . retaining membership."

"Periodic dues" may be payable monthly, as is frequently the case, but many labor organizations provide in their constitutions or by-laws for quarterly, semi-annual, or even annual dues payments. Depending upon the constitution or by-laws of the particular labor organization, dues payments may become delinquent immediately after they are payable, or at some later date, such as 30 or 60 days after the due date. (See *Matter of Local 1139, United Electrical Workers,* 114 N.L.R.B., No. 202.) Delinquent members may or may not be permitted to pay accrued back dues off in installments. (See *Matter of Teamsters Local 169,* 111 N.L.R.B. 460, enf'd 228 F. 2d 425.) Membership in good standing may be temporarily suspended for dues delinquency after a stated period, *e. g.,* 30 days. Suspended members may be entitled to reinstatement by their subsequent payment of back dues, either with or without a reinstatement fee, as the case may be. Membership may be terminated after a certain period of suspension for non-payment of dues, *e. g.,* 30 or 60 days, through expulsion, depending upon the terms of the union constitution or by-laws. Such suspension and expulsion for dues delinquency may or may not be automatic. In some cases, ex-members expelled for non-payment of dues may be reinstated merely upon payment of back dues and a reinstatement fee, while in other cases such former members must reapply for membership and pay the same initiation fee as a new member.

The *Bloomingdale's* case, *supra,* thus involved an employee who acquired membership on the last day of the 30-day grace period, and thereby was immunized against discharge under the union-security agreement for approximately two years before his actual discharge, although he was recurrently delinquent in dues payments, had been suspended from union membership in good standing for failure to pay a fine, and there had been persistent union requests for his discharge.

The *Aluminum Workers* case, *supra,* similarly involved "a long-time union member who became a dues delinquent" [see R. 43], but was immunized against lawful discharge although having been automatically suspended from the Union for non-payment of two months dues, by virtue of having tendered her back dues together with current dues and a reinstatement fee before her final expulsion from union membership, several months later.

As the Trial Examiner succinctly put it in his Intermediate Report in the present case—

> "Except for an indirect acknowledgment that 'periodic dues' may be required as a condition precedent to the retention of union membership, the statute provides no specific guide with respect to the terms and conditions under which a union-security clause may be enforced against dues-delinquent members." [R. 45.]

In "equating the payment of initiation fees to the payment of dues under the 'free rider' concept," the Board's majority, according to the dissenting Board members [R. 72-73] "fails to come to grips with a fundamental distinction between initation fees and dues."

What then is this "factual difference" which "cannot be dismissed as insignificant?" [R. 44.]

It is that a non-member employee who has not made an application to join the union by tendering his initiation fee is under no financial duty or other obligation to the labor organization. Unlike the dues delinquent member, he is not bound by the Constitution and By-Laws of the Union as a matter of contractual liability. He has incurred no legal debt to the Union for the amount of the uniformly-required initiation fees, periodic dues, or financial payments of any kind. As time passes, the non-member employee, unlike the delinquent member, does not

become increasingly liable for back dues, since he never became liable for any dues payment at all.

An employee, like Leona H. Boness in the *Aluminum Workers* case who has timely paid an initiation fee and is delinquent only with respect to dues payments, "causes a union no monetary loss" [R. 73] by a belated tender of all of the outstanding dues.

An employee, like Hayden A. Balthrope in the present case, who has failed to timely tender his initiation fee, escapes the payment of periodic dues which would have accrued had he acquired membership within the 30-day grace period as required by the contract, and thus "profits from his own dereliction at the expense of the Union" [R. 73] if belated payment of the initiation fee at any time prior to his discharge is to be accepted as substantial performance of the "tender" requirement which is a valid condition of his continued employment.

It is this factual difference which compels the significant conclusion that under a valid union security agreement such as the instant contract between the Respondent Company and Union, *time is of the essence* with respect to the fulfillment of the initial membership requirement created by the collective bargaining agreement (*i. e.,* tendering initiation fees before the expiration of the 30-day grace period), whereas dues delinquencies under most union constitutions and by-laws may be overcome through belated payment of back dues and current dues together with such reinstatement fees as may be required, so that time may not be of the essence with respect to the "periodic dues" obligations of a member.

B. The Different Factual Situations in the Two Cases.

The following comparison of the facts found by the Board in the *Aluminum Workers* case, *supra,* 111 N.L.R.B. 63, 112 N.L.R.B. 619, with the stipulated facts [R. 18-21] in the present case readily establishes these *material differences* which render the two cases distinguishable from each other:

Aluminum Workers Case (13-CB-303)	Technicolor-Film Technicians Case (21-CA-2172; 21-CB-698)
9/1/53. Leona H. Boness, who had been a "union member during her entire employment of 3 years with the Company" became "automatically suspended from the Union" for non-payment of dues covering 2 preceding months.	8/31/54. Hayden A. Balthrope who "had been employed for a number of years preceding the July 31, 1954, agreement" but "had made no application for membership in nor tendered initiation fee to the Union" became subject to discharge for "failure . . . to join the Union under the terms of the union-security provisions of the contract." Union made initial written request for discharge within 3-day additional grace period "pursuant to the terms of the collective bargaining agreement."
9/9/53. Boness tendered back dues and current dues.	9/1/54-9/30/54. "The Company refused to so discharge Balthrope."
9/10/53. Union rejected "proper tender of dues" stating "no dues acceptable except at union meetings"	

Aluminum Workers Case (13-CB-303)	Technicolor-Film Technicians Case (21-CA-2172; 21-CB-698)
although no legal justification for this position.	
9/21/53. Union conditionally requested discharge unless employee's "good standing" was regained "within a five day grace period."	
9/24/53. Boness again tendered back dues at Union meeting and was informed Union "would not accept her dues without payment of a $15 reinstatement fee."	
10/10/53. "Boness again tendered her dues" for past 3 months for current month, and for 2 months in advance, but "would not pay the $15 reinstatement fee whereupon [the Union] again refused Boness' tender."	
10/27/53. Union "notified the Company to discharge Boness for failure to pay her dues. The Company did not act on the [Union's] request."	10/1/54. "Again . . . by letter . . . the Union demanded the discharge of Balthrope by the Company pursuant to the collective bargaining agreement between the parties. The Company continued to fail to do so."

Aluminum Workers Case (13-CB-303)	Technicolor-Film Technicians Case (21-CA-2172; 21-CB-698)
11/4/53. Oral renewal of discharge request by International Union representative. The Company advised the Union "it would not discharge an employee for dues delinquency until such employee were expelled from the Union."	10/2/54-1/?/55. "Numerous oral demands were made upon the Company that it live up to the terms of the collective bargaining agreement and pursuant to those terms discharge Balthrope. The Company continued to fail to accede to those demands."
11/6/53. "Boness did in fact tender her current and delinquent dues and the specified $15.00 reinstatement fee" and the Union "thereafter refused this tender."	
11/18/53. "By letter dated November 18, 1953, the [Union] advised the Company that Boness had been expelled from union membership and it again requested her discharge."	12/7/54. "Balthrope made application for union membership and accompanied such application with his check for union initiation fees. . . ."
11/19/53. "Finally, on November 19, pursuant to the new request by the [Union], the Company discharged the Complainant."	2/7/55. "Union Executive Board approved Balthrope's application."
	2/10/55. "Balthrope was discharged by the Company."

Examination of the facts found by the Board, summarized above, together with the additional undisputed facts disclosed by Circuit Judge Lindley's opinion upon enforcement of the order (230 F. 2d 515) likewise demonstrates that the Board's brief in the present case (pp. 7-8) does *not* present a complete and accurate summarization of the Seventh Circuit's decision in the *Aluminum Workers* case, *supra.*

That case did not, as stated by the General Counsel, merely involve a situation where—

> ". . . the Union demanded the discharge of a dues delinquent employee; the employee then tendered the dues; the union refused the tender and reiterated—this time successfully—the demand for discharge."

The *Aluminum Workers* decision rather involved a situation where the employee in good faith tendered her dues on *four* separate occasions and all *four* tenders were refused, *before* the Union improperly demanded her discharge without first expelling her from membership as required by the union-security agreement; then, the employee made a *fifth* tender of her dues together with a requested reinstatement fee *after* which the union nevertheless expelled her, refused the tender, and reiterated—this time successfully—the demand for discharge.

Moreover, the dischargee (whose good faith tenders of back dues were thus improperly rejected by the union on four occasions before any unconditional request for her discharge had been made) became delinquent under a newly adopted union by-law of which she was unaware, reducing the grace period from three months to two; had her proffered dues rejected the first time for a legally insufficient reason during the period of a strike called by the union when she refused to participate in strike activities, crossed the picket line to go to work, and declined to attend union meetings; and in turn met each and every

request of the union, by tendering her dues at a union meeting rather than mailing them as originally and paying the reinstatement fee demanded, before she was ever expelled from the union, and before any proper demand for her discharge had ever been made by the union in accordance with the terms of the collective bargaining agreement.

Such facts are wholly different from the record in the instant case where the Union properly demanded Balthrope's discharge in accordance with the terms of the valid union-security agreement *before* the employee ever tendered his initiation fee; the Union never refused any tender by the employee, and the delay in his discharge in accordance with the contract was not occasioned by any good faith attempts at tender by the employee nor any improper demands by the Union.

C. The Different Legal Issues.

The actual holdings by the Board in the *Aluminum Workers* case, *supra,* which were approved by the Court of Appeals for the Seventh Circuit, are summarized in Circuit Judge Lindley's opinion (230 F. 2d 515) as follows:

> "In its *original decision* on February 1, 1955, [111 N.L.R.B. 411] the Board concluded that Boness made a *proper tender of her dues* on September 9 which was *refused for a reason not related to the reinstatement fee;* that by this refusal *respondent had waived whatever right it might have had to insist on the fee* and that by causing her discharge *under the existing circumstances,* respondent had violated Sec. 8(b)(2) and 1(a) of the Act.
>
> "Upon reconsideration [112 N.L.R.B. 619], the Board adhered to this view and concluded additionally that, even if payment of the reinstatement fees were a proper *condition subsequent* to Boness' good standing in the Union, she had satisfied the condition

by her *tender of the dues and reinstatement fees* on November 7 *before respondent had expelled her and before the company had acted on the demand for her discharge.*" (Emphasis added.)

In approving the ground of decision upon which the Board's original determination was based, the Seventh Circuit Court sustained the correctness of the proposition that a long-time union member, with no record of prior dues delinquency, who is "willing at all times to pay her own way" and in good faith "tendered her . . . dues promptly in accord with her belief as to the due date" is not a *"free rider"* with whom "the discharge provisions of the Act were designed to cope." More specifically, the Court upheld the Board's conclusion that when the Union "refused her tender on a ground which was legally untenable" (*i. e.,* on the sole ground that tender was made by mail rather than in person at a Union meeting), without demanding a specified reinstatement fee as a condition for her dues, any unstated defect in the tender was waived and could not subsequently be relied upon as an afterthought to justify her discharge under the union-security agreement.

Similarly, in concluding, as an alternative basis for its decision, that the Board's order could be supported "upon the second ground assigned by the Board on reconsideration," the Seventh Circuit Court expressly held that, where a union acquiesced in the employer's interpretation of a union-security agreement as requiring expulsion of a delinquent employee from Union membership before her discharge can be effectively demanded under the contract and the employee tendered in full both the periodic dues and reinstatement fee claimed by the Union, which tender was refused prior to her expulsion and the successful demand for her discharge based thereon, such discharge could not be justified as having been predicated upon ter-

mination of Union membership for "failure of the employee to tender periodic dues" within the meaning of the "Union shop" proviso of the Act.

The legal issues decided in the *Aluminum Workers* case are wholly distinguishable from those raised by the present proceeding.

The *Aluminum Workers* case basically involved the question as to whether the situation where a Union which in apparent bad faith repeatedly rejected for questionable reasons an allegedly delinquent member's good faith "attempts to pay her own way" without any undue delay (so that it would appear that the Union was relying upon "nonpayment of dues" as "a lily-white front to cloak a demand for her discharge based on some other reason"), presented the "free rider" situation which the discharge exceptions of the Act were designed to meet.

As noted before, the present case involves instead the situation of a Union which promptly made a lawful demand for enforcement of its valid Union security agreement against a non-member employee who had utterly failed without excuse or justification to tender his initiation fee within the 30-day grace period. The Union repeatedly insisted upon strict compliance with such lawful initial request for discharge, without any indication in the record of waiver, acquiescence, misrepresentation, estoppel or improper motivation on the part of said labor organization.

In the *Aluminum Workers* case, the Seventh Circuit Court rested its decision in large part upon the *"background"* of repeated tenders rejected on debatable grounds which made the Union's demand for discharge "suspect"; the *"good faith"* of the charging party; the existence of a breach of the Union's duty to inform the delinquent member of its specific requirements for reinstatement as the *reason for her delinquency;* and the *"waiver"* by the

Union of the legal consequence of such delinquency, none of which issues are claimed to exist in the present case. [See R. 74, fn. 11.]

In the *Aluminum Workers* case, the Union's earlier (October 27) demand for discharge was not proper under the terms of the collective bargaining contract, and the employee made the maximum tender requested by the Union as a condition of reinstatement to membership before a proper demand for discharge was made on November 18. The Board's supplemental decision upon reconsideration in that case somewhat ambiguously stated in broad and sweeping terms that "a full and unqualified tender made anytime prior to actual discharge, and *without regard as to when the request for discharge may have been made,* is a proper tender and subsequent discharge based upon the request is unlawful." (112 N.L.R.B. at p. 621.)

Although that foregoing language is quoted by the Board's majority in the instant case as the "holding" in the *Aluminum Workers* case [R. 62], the Seventh Circuit Court there distinguished between the October 27 occasion when the respondent Union "first demanded Boness' discharge" without previously expelling her from membership as admittedly required by the contract, and the respondent Union's "subsequent action in formally expelling Boness on November 12, and thereafter [November 18th] submitting a new demand for her discharge."

The actual holding on this point approved by the Seventh Circuit Court was predicated on its finding that "prior to her expulsion and the operative demand for her discharge," Boness "had tendered to respondent every cent it had demanded for reinstatement."

Under the circumstances of the present case, Balthrope did not tender his initiation fee until long *after* his dis-

charge had been demanded in accordance with the requirements of the contract.

In the *Aluminum Workers* case, four members of the Board (including members Murdock, Peterson, and Rodgers, and former chairman Farmer) in effect adopted the views of Board member Murdock's dissenting opinion in the *Chisholm-Ryder* case (94 N.L.R.B. 508) that since the statute "does not specify in explicit terms the time when an employee is required to tender his dues to a Union holding a duly authorized union-security agreement in order to be entitled to the protection of the Act" and under the "settled rules as to effectual tenders" a belated tender may be upheld "except where time of performance is of the essence," the amended Act may be interpretated so that "an employee's job is secure provided requisite dues and fees are tendered before the union terminates membership for failure to do so."

The Board's majority in the present case (including members Murdock and Rodgers, and chairman Leedom with members Peterson and Bean dissenting) would apply the *Aluminum Workers* doctrine involving belated tender of Union dues and reinstatement fees *before* the employee's *"expulsion from the union"* which rendered him vulnerable to discharge under the Union-shop agreement to facts involving a belated tender of Union initiation fees *after* the expiration of the 30-day grace period which concededly rendered the employee vulnerable to discharge under the Union-shop agreement, although the statute explicity states the time when tender of initiation fees is required and under general law timely performance of such a tender requirement is plainly of the essence.

The General Counsel presents (*Board's Br.,* p. 9) a misleading quotation from the dissenting opinion of Board member Murdock in the *Chisholm-Ryder* case, *supra,* 94 N.L.R.B. at p. 514, as if it were the actual holding of

that "previous decision" which was apparently "overruled" by the *Aluminum Workers* case. The actual quotation (with the language deliberately omitted by the Board's brief herein indicated by italics) merely stated that in *Chisholm-Ryder:*

> "*The majority's decision holds* that the Act does not prohibit a union, *under these circumstances,* from rejecting a legitimate offer of payment in order to preserve a delinquency which may be used as the basis for a discharge."

What were those common circumstances in both the *Chisholm-Ryder* and *Aluminum Workers* cases which caused the Board to declare in the latter decision (112 N.L.R.B. at p. 621, fn. 7) that "To the extent that this decision is inconsistent with the *Chisholm-Ryder* case, that case is hereby overruled." Both cases involved an unaccepted belated tender of dues from a delinquent member, who had tendered his initiation fee and joined the Union before the expiration of the 30-day grace period. Both cases likewise involved an earlier improper demand for discharge prior to the delinquent member's expulsion from the Union followed by a subsequent expulsion and renewed successful demand for discharge after an intervening tender of the unpaid dues has been rejected by the Union.

The distinguishing circumstances of these two cases (which may explain why *Chisholm-Ryder* was only partially overruled) include the facts that in the earlier case, where the discharge was upheld, "the Union's constitution and by-laws did not provide for the restoration of membership rights or prevent expulsion on payment of delinquent dues," whereas in *Aluminum Workers* the Union's constitution and by-laws provided among other things that members remain in good standing "until expelled or suspended and not reinstated," and that "the reinstatement fee for suspended members shall be not less than $15."

Moreover, in *Chisholm-Ryder,* the dischargee "was repeatedly warned in person and by union notices that he should pay his August dues"; and "the union offered him an opportunity to sign an authorization for the company to check off his dues which he refused"; and "the union's chief steward offered to obtain for him a loan of the [amount] to pay his August dues," whereas in *Aluminum Workers* the employee "stated she was unaware of the new two-months delinquency rule"; "tendered her . . . dues promptly, in accord with her belief as to the due date"; "was not then advised that she owed a reinstatement fee"; and "several weeks elapsed after the tender before the fee was demanded" although the employee "could not determine, until a demand was made, how much she owed by way of a reinstatement fee."

In the present case, unlike either *Chisholm-Ryder* or the *Aluminum Workers* case, the dischargee did not tender his initiation fee and join the Union before the expiration of the 30-day grace period; the Union's initial demand for discharge was not ineffective because of lack of expulsion of the dischargee from membership or non-compliance by the Union with any other condition precedent to an effective demand for discharge under the terms of the contract; there was no rejection of any legitimate tender of initiation fees by the dischargee either on a legally untenable ground, or to preserve the delinquency as a basis for discharge, nor was there any rejection of tender at all; the Company's delay in acting upon the Union's initial prompt request for discharge cannot be explained on the basis that it was made before there was a "formal and final adjudication" by the Union of Balthrope's membership status, nor for that matter, can it be explained on any basis revealed by the record at all.

In view of these glaring distinctions between the factual situation and the legal issues confronting the Court of Appeals for the Seventh Circuit in the *Aluminum Workers*

case and those confronting this Honorable Court of Appeals for the Ninth Circuit in the instant case, Respondents Company and Union herein are at a loss to understand the basis for the General Counsel's contentions that the Seventh Circuit's decision is "squarely in point" (Board's Br. p. 7) and that the "same result follows *a fortiori* in the instant case." (*Ibid.* p. 8.)

If this unreasonable Board precedent is permitted to stand, labor unions will obviously feel impelled to call strikes or take other drastic economic action upon all occasions where the employer fails to immediately discharge a non-union employee at the expiration of the 30-day period, since otherwise a belated tender of initiation fees will forestall the subsequent discharge of a non-member who thereby can escape payment of dues for a period of perhaps three or four months. Thus, the employer will be deprived of all opportunity to seek to find a suitable replacement, or to attempt in good faith to investigate, arbitrate, or litigate the propriety of the union request for the non-member's discharge. (See *Matter of International Association of Machinists,* 116 N.L.R.B., No. 92, decided August 17, 1956, where the Board held, under the *Aluminum Workers* doctrine, that a union cannot lawfully enforce a discharge for dues delinquency pursuant to an arbitration award establishing the necessity for such discharge under the terms of a valid union-security agreement, where the employee in question tendered his back dues after the arbitration award was announced but before the actual discharge was carried out.)

Such a result as sought to be enforced by decree herein is contrary to "the legislative intent, previously noted, with respect to agreements establishing a limited form of union security in order to promote industrial stability." [R. 55.]

III.

The Dissenting Board Members and the Trial Examiner Properly Found That Unexplained Delay by the Employer in Carrying Out Lawful Contract Provisions, Calling for Prompt Discharge Upon Notice of Failure to Tender Initiation Fees Within the 30-day Grace Period, Without Acquiescence or Waiver of the Requirement by the Contracting Union Cannot Unilaterally Extend the Deadline for Such Tender by Non-union Employees.

Article 3(b) of the collective bargaining agreement of July 31, 1954, between the Respondent Company and the Respondent Union herein reads as follows [General Counsel's Ex. 2, R. 19, 31]:

> "Within a reasonable time, but not to exceed 3 days, after receipt of written notice from the Union that any such employee is not a member as above required, the Producer shall discharge any such employee. The Producer shall not be in default unless it fails to act within said time after receipt of such notice."

Following the expiration of the 30-day grace period, on August 31, 1954, and again on October 1, 1954, the Union notified the Company *in writing* "that employee Hayden Balthrope has failed to become and remain a member . . . after the thirtieth day following the execution of our current collective bargaining agreement" and "has not made application to join the Union nor has he tendered the regular dues or initiation fees as required within the time limits provided." [Ex. "A" attached to *General Counsel's* Ex. 2; R. 22-23; See also R. 30-31, 31-32, 61.]

Such written notice also advised the Company that "Based upon the failure of this employee to complete

membership in this Union, in accordance with the requirement of Article 3, Paragraph (b)," his discharge was being demanded, and the Company "will be deemed to be in default of its contract unless such discharge is completed within a reasonable time not to exceed three days after the receipt of this letter." *(Ibid.)*

The stipulated facts disclose only that "The Company refused to so discharge Balthrope" and "continued to fail so to do" or to accede to numerous oral demands "that it live up to the terms of the collective bargaining agreement" until February 10, 1955. [R. 31-33, 34, 61-62, 72; General Counsel's Ex. 2, pars, 3 and 6 at 19-20.] No special facts or circumstances appear in the record to explain this delay in complying with Article 3(b) of the contract. [R. 54.]

In effect, the General Counsel contends without any statutory or other authority therefor that the unexplained failure of the Company to discharge Balthrope within the 3-day period following its receipt of the Union's notice of August 31, 1954, or even within the 3-day period following its receipt of the Union's repeated notice of October 1, 1954, served to extend the 30-day grace period as to Balthrope, even though he had personal notice of the requirement of his Union membership as a condition of employment "shortly after" the execution of the contract containing the Union security clause, and "permitted at least four months to elapse before making any effort to tender his initiation fee." Here again, no explanation for this delay by Balthrope was ever offered. [R. 54-55.]

In the present case, as in *Matter of Bloomingdale's, supra,* 107 N.L.R.B. No. 62, the fact that the Company may have taken extra care to make certain that it was only carrying out its legal obligation under the Union security provisions of the contract; that it did not discharge the employee until it had been repeatedly advised by the Union

that financial delinquency was the sole reason for demanding the employee's discharge; and that it took steps itself to acquaint the employee with the contract requirements, did not convert the Union's valid request for discharge into an unlawful act and did not make Balthrope's discharge by the Company, due to his failure to make proper timely tender of the initiation fee, contrary to Section 8(a)(3). See Board's Nineteenth Annual Report, p. 93, and fn. 5 thereon referring to member Murdock's concurring opinion in *Bloomingdale's* which reasoning was later supported by the Second Circuit in denying enforcement against the Union at 216 F. 2d 285.)

A totally different case would be presented if the Company and the Union had mutually agreed through collective bargaining to afford Balthrope an additional period of time in which to make tender of his initiation fees. (See *Matter of Busch Kredit Jewelry Co., Inc.,* 108 N.L.R.B. No. 170.) The fact that the Union chose to insist upon Balthrope's dismissal in order to strictly enforce the union shop provision of its collective bargaining agreement rather than extend leniency cannot render the discharge or the request therefor illegal (*Matter of Standard Brands, Inc.,* 97 N.L.R.B. 737), since the Union did not waive or acquiesce in the particular untimely tender or regularly accept untimely tenders from other employees. (See *Matter of Ferro Stamping & Mfg. Co.,* 93 N.L.R.B. 1459; *Matter of Biscuit and Cracker Workers, Local Union No. 405,* 109 N.L.R.B. 985, and *Matter of Busch Kredit Jewelry Co., Inc., supra.*)

In the absence of a Union's refusal of attempted tender by the non-union employee prior to the initial valid request for his discharge, as in the *Aluminum Workers* case, there are no judicial decisions holding a belated tender of dues or initiation fees effective to forestall an otherwise valid discharge.

There is no support in the law, judicial precedents, legislative history or even simple logic for such a result. Balthrope concededly was subject to discharge for failure to tender his initiation fee within the 30-day period. (Board's Br., p. 5.) The Union's written request for his discharge was a valid one at the time it was made. (*Ibid.,* pp. 8-9.) The unexplained delay in his discharge by the Company was not authorized by any of the terms or provisions of the collective bargaining agreement. (Board's Br. p. 8.) Such delay in carrying out the discharge as required by the contract only operated to the prejudice of the Union membership and not to Balthrope's prejudice. If there was any "discrimination" it operated in Balthrope's favor by reason of the Company withholding his discharge for an additional three months after this employee became subject to discharge due to his own act of omission, perhaps out of an excess of caution in order to satisfy itself that the Union was *not* relying upon the valid union-security requirement of the contract to disguise some improper motive behind the demand for his discharge.

The *Aluminum Workers* case, *supra,* stands upon its own peculiar facts which have already been distinguished in this brief from the present case. That decision cannot serve as authority for the proposition necessarily urged by the General Counsel herein that an unexplained delay by the employer in carrying out a valid request for discharge under a valid union shop contract will operate to create an additional grace period for the initial completion of union membership, without the consent or acquiescence of the Union representing the majority of the employees in the bargaining unit.

Where such unexplained delay occurs without any fault or responsibility of the contracting Union, the *Aluminum Workers* decision did not make it unlawful for the Union to insist upon observance of its valid union-security agree-

ment by the employer nor unlawful for the employer to live up to its contract after repeated Union demands that it do so.

The Trial Examiner [R. 54-56] and the dissenting Board members [see R. 72] properly found that there was "no discretion vested in this agency, by the statute to impose a rule of conduct on employers and unions" which "would permit the unilateral extension, by employers, of contractually established deadlines for the tender of uniformly required initiation fees by the non-union employees in a contract unit" so that "valid and legal union-security agreements could be rendered nugatory and unenforceable, in practice, by the unilateral decision of the employers involved to delay compliance with their terms."

IV.

Other Valid Defenses Exist Which the Board Arbitrarily Refused to Consider.

In the light of his disposition of this case upon other grounds, the Trial Examiner herein expressly found it unnecessary to pass upon certain additional grounds of defense duly raised by the Respondent Union, namely that:

(1) The *"Aluminum Workers* doctrine, even if applicable, ought not to be applied retroactively to invalidate a discharge permissible under the decisional doctrine recognized as valid when it took place."

(2) The "record reveals no discriminatory motive for Balthrope's discharge."

(3) The record "contains no independent evidence of interference, restraint or coercion directed to the respondent firm's employees."

(4) The charging party "did not, in fact suffer any loss of wages or other benefits." [R. 57-58.]

In its "Reply Brief" before the Board, in support of the Trial Examiner's recommended order of dismissal, the Respondent Union specifically urged the Board to consider the above-mentioned issues not passed upon by the Trial Examiner in the event that it concluded (contrary to the Trial Examiner) that the *Aluminum Workers* doctrine was applicable. [R. 80.]

Although the majority of the Board members concluded that "the principle enunciated in the *Aluminum Workers* case is applicable to the particular facts herein" [R. 63], none of these four issues are discussed or even referred to by the Board's decision, except to the extent that the absence of evidence of *"loss of pay"* is briefly alluded to in a footnote in connection with a discussion of the remedy ordered by the Board. [R. 65, fn. 6.]

Both Respondent Company and Respondent Union filed motions for reconsideration again urging that the Board pass upon these four alternative grounds of defense which had been virtually ignored and notifying the Board that these Respondents intended to urge these objections to the Order herein in appropriate proceedings before this Honorable Court if the Board persisted in its failure to expressly consider and render its opinion and decision with respect to these particular contentions. [R. 79-83.]

These motions for reconsideration were summarily denied with the bare assertion that "they contain no issues which were not previously considered by the Board," [R. 84], although the General Counsel now seeks to overcome these four defenses by citing various cases neither cited nor relied upon with respect to any of these issues in the proceedings below. (Board's Br. pp. 9-11.)

The General Counsel's claim that these "arguments advanced by the respondents in the instant case were likewise advanced in the *Aluminum Workers* case and were there rejected, either expressly or impliedly, by the Sev-

enth Circuit" (Board's Br. p. 8) is not borne out by Circuit Judge Lindley's opinion which states that, "In the view we take of this cause, we see no reason to consider other points advanced. . . ."

A. The Questioned Discharge Took Place at a Time When It Was Authorized by Established Board Rulings Then Still in Effect.

The Boards unqualified pronouncement that a belated tender does not forestall a valid discharge was laid down in the *Chisholm-Ryder* case, 94 N.L.R.B. 508, on May 16, 1951.

On January 3, 1952, the Board transmitted its *Sixteenth Annual Report* to the President and the Congress discussing this doctrine and citing the majority view in *Chisholm-Ryder* as the law at page 185.

Likewise, the *Seventeenth Annual Report,* transmitted on January 5, 1953 cited the *Chisholm-Ryder* case and the explanation thereof in the previous year's Report as continuing to reflect the current rulings of the agency. (P. 147.)

On August 5, 1954, Trial Examiner Ralph Winkler issued his Intermediate Report in the *Aluminum Workers* case, citing *Chisholm-Ryder* "to the effect that a belated tender does not forestall a valid discharge." (I.R.-493, Case No. 13-CB-303, p. 8.)

The initial decision in the *Aluminum Workers* case, 111 N.L.R.B. No. 63, dated February 1, 1955, reversed the Trial Examiner upon other grounds and left the *Chisholm-Ryder* doctrine unqualified.

The alleged unfair labor practices in the present case are based upon the discharge of Balthrope on *February 10, 1955.* The instant charges were filed on *February 14, 1955,* [R. 1-4] and were retained under investigation

until the Consolidated Complaint was issued on August 25, 1955. [R. 9.]

The *Aluminum Workers* supplemental decision, partially reversing the *Chisholm-Ryder* case, 112 N.L.R.B. No. 80, was rendered on May 6, 1955, and, the decision granting enforcement of that Order was not handed down by the Seventh Circuit Court of Appeals until March 2, 1956.

Both this Honorable Court of Appeals for the Ninth Circuit (*N.L.R.B. v. Guy F. Atkinson Co.,* 195 F. 2d 141; *Cf. N.L.R.B. v. Stoller,* 207 F. 2d 305, cert. den., 347 U. S. 919) and the Board itself (*Almeida Bus Lines, Inc.,* 99 N.L.R.B., No. 79; *Tom Thumb Stores, Inc.,* 97 N.L.R.B. 57; *Yellow Cab Co. of California,* 93 N.L.R.B. 766; *Skyview Transportation Co.,* 92 N.L.R.B. 1664) have recognized that an important policy change should not be given retroactive effect in an unfair labor practice case involving possible reinstatement and back pay, for example, under circumstances where such a result would be harsh and unjust.

Nothing contained in the *Aluminum Workers* opinion deals with this question as to whether that decision should be applied retroactively to the substantial prejudice of a Company and Union who acted properly with respect to the questioned discharge under announced Board policies prevailing at the time.

The General Counsel contends that "the *Chisholm* decision was never applicable to the facts of this case and any reliance upon it by respondents was misplaced", because here "the Union *accepted* the payment and hence did not preserve a 'delinquency' as in the *Chisholm* case." (Board's Br. p. 9.)

It is immaterial, in the absence of an actual waiver by the Union of such delinquency, whether or not the Union accepted a belated tender of initiation fees. As the dis-

senting Board members pointed out herein [R. 74-75], acceptance of Balthrope's untimely payment did not mean that the Union "was waiving its pre-existing right to have him discharged under the terms of the Union-security clause" nor was it "necessarily inconsistent" with the Union's "exercise of its legal right to have him terminated for his past delinquency under the contract." According to the *Chisholm-Ryder* doctrine, Balthrope's belated tender of his initiation fee was clearly insufficient to give him any immunity to discharge under the Technicolor contract, but its acceptance "did give him certain prospective employment opportunities" [R. 75] elsewhere in the Motion Picture Industry of Southern California. [See also R. 20-21, 24.]

More importantly, perhaps, the General Counsel cites a few authorities in support of his argument that administrative agencies, such as the National Labor Relations Board, are "free to overturn erroneous precedents even though the new decision may appear to work a hardship on one of the parties involved." (Board's Br. pp. 9-10.) *Securities Exchange Commission v. Cheney Corp.*, 332 U. S. 194, one of such authorities cited by the General Counsel was very effectively distinguished and disposed of by this Honorable Court's opinion in the *Atkinson* case, *supra,* and requires no further comment.

The *Atkinson* case is squarely contrary to the position of the General Counsel regarding the alleged freedom of the Board to "work hardships upon respondent altogether out of proportion to the public ends to be accomplished" by imposing the "impact of retroactive policy making upon a respondent innocent of any conscious violation of the Act, and who was unable to know, when it acted, that it was guilty of any conduct of which the Board would take cognizance."

The *Stoller* case, *supra,* merely held that the *Atkinson* rule was "not in point" because there was no long-established Board policy favoring respondents' position which existed at the time the alleged unfair labor practices occurred, and which the Board later replaced with a new policy sought to be applied retroactively.

Respondents Company and Union herein do not contend that the Board is a "slave to its rules" (*Foreman & Clark, Inc. v. N.L.R.B.* (C. A. 9th), 215 F. 2d 396, cert. den. 348 U. S. 887) nor that the Board may not appropriately issue cease and desist orders which operate *prospectively* based upon the retroactive application of the Board's change of policy. (*N.L.R.B. v. National Container Corp.* (C. A. 2nd), 211 F. 2d 525; *N.L.R.B. v. Guy F. Atkinson Co., supra.*)

We do contend that an order which requires the reinstatement of an employee discharged pursuant to the express terms of a valid union-security agreement under a retroactive reversal of the Board's decisions plainly authorizing such discharge at the time it was made was "arbitrary, capricious and an abuse of discretion" within the meaning of Section 10 of the Administrative Procedure Act, as quoted and interpreted in the *Atkinson* opinion of this Honorable Court, *supra.*

B. The Record Contains No Evidence of Discriminatory Motivation for the Questioned Discharge Within the Meanings of Sections 8(a)(3) and 8(b)(2).

Proof of unlawful motivation is a prerequisite to a finding of violation of Sections 8(a)(3) or 8(b)(2) of the Amended Act, although such illegitimate or prohibited purposes may be inferred from the type of discrimination shown. (*Radio Officers' Union v. N.L.R.B., supra,* 347 U. S. 17.)

The legislative history of the "union shop" proviso shows that it excepts an employer from the prohibitions against discrimination to encourage union membership "to the extent he obligates himself to do so under the terms of a permitted union shop or maintenance of membership contract." (House Conf. Report No. 510, 80th Cong., 1st Sess., p. 44.)

In the present case, the evidence in the record permits only one inference on the issue of motive, *i.e.,* that the sole reason for the discharge of Balthrope by the Company and for the Union's request for his discharge was to carry out a valid union shop provision because of the employee's failure to tender the regular initiation fee within the 30-day grace period, as permitted by law.

The Company's lack of improper motivation is affirmatively shown by the stipulated fact that Balthrope "admits being informed by management officials . . . of the execution of such contract." [General Counsel's Ex. 2, Par. 2, at R. 19.] The Company was plainly justified in believing that the sole reason for the Union's request ["Ex. A" attached to General Counsel's Ex. 2 at R. 22-23] was the employee's failure to tender the uniformly required initiation fee on time. It had been repeatedly advised by the Union that non-tender of initiation fees and strict enforcement of the union shop provisions of the collective bargaining agreement were the sole reasons for demanding the employee's discharge. [General Counsel's Ex. 2, Par. 3, at R. 19-20.] The Consolidated Complaint, as amended, merely charges that the Company "discharged the said Hayden A. Balthrope at the request of IATSE" [Par. 9, at R. 8], thereby violating Sections 8(a)(1) and 8(a)(3).

The stipulated facts herein compel acceptance of the truth of the Company's verified Answer to this charge, namely that "as required by the terms of a valid union shop agreement" it "discharged Hayden A. Balthrope for

failure to tender the initiation fees uniformly required as a condition of acquiring or retaining membership in Respondent Local 683 within thirty days after the effective date of a valid union shop agreement" having been "previously notified of such non-tender on the part of Hayden A. Balthrope by Respondent Local 683 and requested to discharge said employee on or about October 1, 1954, as permitted by the proviso to Section 8(a)(3) of the Act." [General Counsel's Ex. 1-M, Par. IX, at R. 15-16.] Such facts will not support a finding of unfair labor practices against the Company. (*Matter of Bloomingdale's,* 107 N.L.R.B., No. 62, *supra.*)

With respect to the motivation of the Respondent Union, the record likewise reveals only that "Upon the failure of Balthrope to join the Union under the terms of the union-security provision of the contract," it "made a written demand . . . that he be discharged pursuant to the collective bargaining agreement" on two occasions, and "numerous oral demands upon the Company that it live up to the terms of the collective bargaining agreement and pursuant to those terms discharge Balthrope." [General Counsel's Ex. 2, Par. 3, at R. 19-20.]

The Union's lack of improper motivation is affirmatively shown by the stipulated facts that, without abandoning its insistence upon strict compliance with the union shop requirement at Technicolor, it acted favorably upon Balthrope's belated membership application of December 7th [General Counsel's Ex. 2, Par. 5, at R. 20] and secured another comparable position for him at Consolidated Film Laboratories under union contract. [*Ibid.,* Par. 7, at R. 20-21.] Ironically enough after charging the Union with inducing the Company to "discriminate" against him on February 14, 1955 [General Counsel's Ex. 1-C at R. 1-2], Balthrope wrote the Union on the following day "stating that he had arranged to take the position offered him at Consiledated Film Laboratories and *thanking the*

Union for its assistance." [General Counsel's Ex. 2, Par. 7, at R. 21.]

The only motivation alleged by the General Counsel in the Consolidated Complaint [Par. 6, at R. 7] for the Union's request was the employee's "failure to tender the periodic dues and initiation fees uniformly required as a condition for retaining membership in the union." Under such circumstances, no violation of Section 8(b)(2) can be found to exist. (*Matter of Air Reduction Co.,* 103 N.L.R.B. 64; see also *Matter of Bloomingdale's, supra,* 107 N.L.R.B., No. 62, opinion of Member Murdock, and opinion of Second Circuit, 216 F. 2d 285.)

C. The Record Contains No Evidence of Interference or Restraint or Coercion of Employees Within the Meaning of Sections 8(a)(1) and 8(b)(1)(A).

Paragraph 11 of the Consolidated Complaint [General Counsel's Ex. 1-E] charges the Company with "interfering, restraining and coercing its employees" contrary to Section 8(a)(1) by "the acts and conduct set forth and described in paragraph 9 above," *i.e.,* discharging Balthrope at the request of the Union for failing to tender his initiation fee on time. [R. 8.]

Paragraph 12 of the Consolidated Complaint charges the Union with "restraining and coercing employees" contrary to Section 8(b)(1)(A) by "the acts and conduct set forth and described in paragraphs 6 and 7 above," *i.e.,* requesting and demanding Balthrope's discharge for failure to tender his initiation fee on time and causing his discharge because of his non-membership when it had in its possession initiation fees belatedly tendered by Balthrope. [R. 7-8.]

Both the Company and the Union denied these allegations in their Answers. [General Counsel's Exs. 1-I and 1-M, Pars. XI and XII, at R. 12 and 16.]

It is clear that no independent evidence exists of violations of Sections 8(a)(1) and 8(b)(1)(A) herein. While there may be derivative violations of Section 8(a)(1), both the Board and the Courts have rejected the theory that a violation of Section 8(b)(2) *derivatively* violates Section 8(b)(1)(A). (Board's Seventeenth Annual Report, p. 239, fn. 94, and *American Newspaper Publishers Ass'n v. National Labor Relations Board* (C. A. 7), 193 F. 2d 782; see also *N.L.R.B. v. Local 369, International Hod Carriers* (C. A. 3, Feb. 6, 1957), ... F. 2d ....., 39 L.R.R.M. 2377.)

D. The Record Contains No Evidence of Any Loss of Wages or Other Benefits by the Dischargee.

Balthrope was discharged by the Company on February 10, 1955, and offered comparable employment at Consolidated Film Laboratories by the Union on that same date. On February 15th, he informed the Union that he had accepted the new position and arranged to report for work at Consolidated when he was available. Balthrope has been continuously employed by Consolidated from the time he accepted his position at comparable wage rates. [General Counsel's Ex. 2, Par. 7, at R. 20-21; see also R. 23-24; 34-35; 65, fn. 6.]

Thus, Balthrope was offered substantially equivalent employment at least *four days* previous to the filing of the instant charges. He accepted that position on the same day that the charges were filed or the day following, and has retained it continuously ever since.

No evidence appears in the record to establish that Balthrope has sustained any loss of earnings or other benefits by reason of the alleged discrimination. On the

contrary, Balthrope secured substantially equivalent employment at Consolidated almost immediately following his termination at Technicolor. There is no evidence of any effects of the Balthrope discharge upon any other employee.

Under these circumstances, even if a technical violation were found to exist, no remedial order could reasonably be found to be necessary or appropriate in order to effectuate the purposes of the Act. (See *N.L.R.B. v. Kingston Cake Co.* (C. A. 3rd), 191 F. 2d 563.)

The General Counsel does not directly seek to support the validity of the "back pay" order herein, but merely suggests that the absence of financial loss to Balthrope disclosed by the record is "a matter appropriate for post-decree proceedings." (Board's Br. p. 11.)

N.L.R.B. v. Ronney & Sons (C. A. 9th), 206 F. 2d 730, cited by the General Counsel, actually supports the position of Respondents herein that the remedial portions of the Board's order will not be enforced if "not supported by substantial evidence on the record considered as a whole."

N.L.R.B. v. Alaska Steamship Co. (C. A. 9th), 211 F. 2d 357, also supports the Respondents' position that back pay may not be ordered where equivalent employment has been made available to the dischargee. While this Honorable Court deferred its consideration of exceptions to the back pay requirement in that case, there the Board had not discussed the subject, either in brief or oral argument and no cross-petition for review was before the Court. Moreover, the record did not indicate as here that the dischargee had actually obtained continuous employment at equal wages almost immediately after

his discharge. Nor was that the case in *N.L.R.B. v. Sterling Furniture Co.* (C. A. 9th), 227 F. 2d 521, 202 F. 2d 4, where this Honorable Court remanded the cause for the Board's reconsideration of a phase of its remedial order.

Conclusion.

Respondents and Cross-Petitioners Technicolor Motion Picture Corporation and Film Technicians Local 683, I.A.T.S.E., urge upon this Honorable Court of Appeals that the stipulated facts and the record as a whole merely disclose an instance of the valid discharge of an employee for failure to tender on time the initiation fee uniformly required, pursuant to the terms of an admittedly valid union shop contract providing the 30-day grace period contemplated by the statute.

Congress specifically intended to permit an employer to discharge an employee at the request of a bona fide union under these circumstances, *i.e.,* where the employee deliberately refuses to tender a regular initiation fee within the 30-day grace period, having knowledge that he is subject to a valid requirement of union membership as a condition of employment under the terms of an existing collective bargaining agreement which makes time of the essence so far as tender of initiation fees is concerned. By reason of his failure in this respect, Hayden A. Balthrope was vulnerable to lawful discharge notwithstanding his belated payment of the initiation fee.

No legally justifiable or other excuse has been offered for the failure of Balthrope to make proper timely tender of his initiation fee. The belated tender of his initiation fee was not made until several months after a valid re-

quest for discharge had been made by the Union and there was no waiver of the 30-day deadline, express or implied, or refusal of a valid tender prior to discharge.

The *Aluminum Workers* case stands upon its own peculiar facts and is distinguishable from the present case.

There is no authority for the proposition that an unexplained delay by the employer in carrying out a valid request for discharge under a valid union shop contract will operate to create an additional grace period for the completion of union membership, without the consent or acquiescence of the Union representing the majority of the employees in the bargaining unit.

Where such unexplained delay occurs, it is not unlawful for the Union to insist upon strict observance of its valid union-security agreement by the Employer nor is it unlawful for the Employer to live up to its contract after repeated union demands that it do so.

The instant discharge was clearly authorized by Board Decisions in effect at the time it took place, regardless of the proper interpretation of later rulings which should not be applied retroactively to impose sanctions against the Respondents arbitrarily.

There is no evidence that the instant discharge or the request therefor were made for discriminatory purposes, or that any prohibited interference, restraint or coercion of employees was intended or resulted therefrom.

No loss of wages or other benefits has been sustained by the dischargee as a result of the termination of his employment by the Company, and in fact the only discrimination resulting from the Company's unexplained delay in complying with the Union's valid request for the

discharge has operated to the benefit of the charging party and the financial detriment of the Union membership.

The Board's petition for enforcement should be denied and its order against both Respondents and Cross-Petitioners should be vacated and set aside in its entirety.

Respectfully submitted,

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February, 1957.

No. 15297

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TECHNICOLOR MOTION PICTURE CORPORATION; AND LOCAL 683, INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE OPERATORS OF THE UNITED STATES AND CANADA, AFL-CIO, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

Respondents' basic contention is that Balthrope by his late payment of initiation fees enjoyed a "free ride" as to dues and was therefore vulnerable to discharge. Thus, respondents seek to distinguish the *Aluminum Workers* case on the ground that the belated tender of dues in that case made the union whole whereas in the instant case the Union received only the initiation fee and not the back dues (Res. Br. 44–60). That this contention is fundamental to respondents' case further appears from their statement at the outset of their "Argument" (Res. Br. 13) that

"the underlying question" is "whether with regard to the payment of initiation fees (*as distinguished from periodic dues*), time is of the essence." [Emphasis supplied.] Similarly, the discussion at pp. 19–22 of Respondents' Brief is devoted to establishing that the Union had no right to Balthrope's dues prior to the time he paid the initiation fee. This attempt to establish that the Union was unable to obtain Balthrope's dues is occasioned by the Supreme Court's pronouncement in *Radio Officers' Union* v. *N. L. R. B.*, 347 U. S. 17, 47, that discharges under the union-security provisions of the Act may be justified only when necessary to protect the union against free riders.

We submit that respondents are in error in contending that the Union's right to dues could not arise prior to initiation into membership. Under the contract, the Union's claim arose following the thirtieth day of employment. Thus, assuming that Balthrope never joined the Union (e. g., because of a religious prejudice against such membership, see *Union Starch & Refining Co.* v. *N. L. R. B.*, 186 F. 2d 1008, 1010–1011 (C. A. 7), certiorari denied, 342 U. S. 815), he would still have been subject to discharge for failure to pay the initiation fee and the monthly dues. This liability arises out of the union security agreement between the Union and the Company, and is binding upon the employees in the bargaining unit. *J. I. Case Co.* v. *N. L. R. B.*, 321 U. S. 332, 334–338.

While the Union had a right to demand that Balthrope pay dues or be discharged for failure to do so, the Union was not required to exercise that right.

It could, if it chose, not try to enforce the union security provisions of its contract. Similarly, it could demand only partial compliance therewith—e. g., payment of the initiation fee but not of accrued dues. Under this latter course, which the Union followed in this case, it apparently condoned the failure to pay dues prior to initiation. Cf. the settled law that an employer may condone employee misconduct and thereby forfeit his right to discharge employees therefor.[1]

In short, the Union could have demanded Balthrope's discharge for failure to pay his initiation fee or his dues or both. It chose to demand only his initiation fee. After Balthrope paid that fee, the Union could no longer lawfully demand his discharge for failure to pay it. The Union's present attempt to justify that demand on the ground that Balthrope had been a "free rider" as to dues must fail, for the Union never asked or required dues of Balthrope, although it was free to do so regardless of whether he paid his initiation fee.[2]

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[1] *N. L. R. B.* v. *E. A. Laboratories, Inc.*, 188 F. 2d 885, 886–887 (C. A. 2), certiorari denied, 342 U. S. 871; *N. L. R. B.* v. *Alabama Marble Co.*, 185 F. 2d 1022 (C. A. 5), enforcing 83 N. L. R. B. 1047, 1048, certiorari denied, 342 U. S. 823; *Stewart Die Casting Corp.* v. *N. L. R. B.*, 114 F. 2d 849, 855–856 (C. A. 7), certiorari denied, 312 U. S. 680, *Eagle-Picher Mining & Smelting Co.* v. *N. L. R. B.*, 119 F. 2d 903, 913–914 (C. A. 8); *N. L. R. B.* v. *Reed & Prince Mfg. Co.*, 118 F. 2d 874, 888 (C. A. 1), certiorari denied, 313 U. S. 595.

[2] Moreover, even assuming, *arguendo*, that the Union could not claim dues from Balthrope, the Union might have a claim against the Company for the dues loss sustained by the Union because of the Company's failure to comply with the terms of the union security agreement.

Respondents contend that the record contains no proof that they were discriminatorily motivated or that their action interfered with, restrained or coerced any employee (Res. Br. 70–74). As stated in our opening brief, pp. 10–11, the *Radio Officers* case establishes that where the specific provisions of the Act are violated, neither the motive nor the effect of the violation need be proved. Thus, here as in *Radio Officers,* the discharge unlawfully encouraged union membership, even though the employee involved was a union member subject to a union security agreement. The statute prohibits discharge for non-membership except under the limited conditions prescribed by the provisos to Section 8 (a) (3). Here the discharge was not pursuant to those limited conditions, but was the result of another condition, not warranted by the statute. The statute, in short, permits discharge for non-payment; it does not permit discharge for *late* payment. Consequently, the discharge violated the Act.

Finally, it should be noted that the Board's decision in this case does not prevent the Union from taking effective action to secure prompt payment of initiation fees. Thus, for example, the Union could impose a fine or other penalty for late payment. What the Union may not do, however, is condition a man's *employment* upon his promptness in paying a fee, if payment is made before an effective request for discharge so that the employee is not a "free rider." The distinction between the Union's power to enforce its internal rules and its power to affect the employment relationship is expressly

preserved by the Act (cf. proviso to Section 8 (b) (1) (A) with Section 8 (b) (2)) and has been repeatedly observed by the courts. See, e. g., *Communication Workers of America* v. *N. L. R. B.*, 215 F. 2d 835, 838–839 (C. A. 2); *N. L. R. B.* v. *Philadelphia Iron Works*, 211 F. 2d 937, 940–941 (C. A. 3); *Union Starch & Refining Co.* v. *N. L. R. B.*, 186 F. 2d 1008, 1011–1012 (C. A. 7), certiorari denied, 342 U. S. 815.

In the instant case the Union in insisting upon Balthrope's discharge, even after he paid and the Union accepted "the only sum which the Union asked or required of [him]" (R. 20), was not protecting itself against a "free rider" but was apparently interested in a disciplinary example of the consequences of late payment. Under the statute, however, the Union may deal with late payments as an incident to the Union's power to "prescribe its own rules" (proviso to Section 8 (b) (1) (A); it may not make compliance with its rules a condition of employment.

The ultimate question in the case is whether Balthrope's failure to join the Union within thirty days left him forever vulnerable to discharge under the contract, or whether he could cure this delinquency by a belated payment.[3] Particularly where the Union accepts the belated payment, it would seem clear that it has received the financial protection which is all that it is entitled to under the proviso to Section 8 (a)

[3] The extensive legislative history quoted by respondents (Res. Br. 23–26) makes it clear that Balthrope was subject to discharge prior to his payment but sheds no light on the effect of belated payment.

(3). *Radio Officers,* 347 U. S. 17, 47; *Aluminum Workers,* 230 F. 2d 515, 520.[4] Its claim for dues, if not waived altogether, may still exist against Balthrope or against the Company, but nonpayment of dues played no part in Balthrope's discharge and cannot be used to justify it.

CONCLUSION

For the reasons stated above and in our opening brief, the Board's order should be enforced.

Respectfully submitted.

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MARCH 1957.

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[4] A case analogous to *Aluminum Workers* is now pending before the Second Circuit, *I. A. M.* v. *N. L. R. B.*, to be argued April 9, 1957, cited at Res. Br. 60. We shall furnish the Court with copies of the Second Circuit decision should it be handed down prior to this Court's decision herein.

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No. 15297

IN THE

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On Petition for Enforcement and Petition for Review of an Order of the National Labor Relations Board

BRIEF FOR AMICUS CURIAE, RAILWAY LABOR EXECUTIVES' ASSOCIATION

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BRIEF FOR AMICUS CURIAE, RAILWAY LABOR EXECUTIVES' ASSOCIATION

STATEMENT

This Court has granted a motion by the Railway Labor Executives' Association, to which all parties have consented, for leave to file a brief in this case as *amicus curiae.*

The Railway Labor Executives' Association (herein called the Association) is a voluntary unincorporated association with its principal office in Washington, D.C., with which are affiliated the following standard national and international railway labor organizations:

American Railway Supervisors Association
American Train Dispatchers Association

Brotherhood of Locomotive Firemen and Enginemen
Brotherhood of Maintenance of Way Employes
Brotherhood Railway Carmen of America
Brotherhood of Railroad Signalmen of America
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes
Brotherhood of Railroad Trainmen
Brotherhood of Sleeping Car Porters
Hotel & Restaurant Employees and Bartenders International Union
International Association of Machinists
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
International Brotherhood of Electrical Workers
International Brotherhood of Firemen & Oilers
International Organization Masters, Mates & Pilots of America
National Marine Engineers' Beneficial Association
Order of Railway Conductors and Brakemen
Order of Railroad Telegraphers
Railroad Yardmasters of America
Railway Employes' Department, AFL-CIO
Sheet Metal Workers' International Association
Switchmen's Union of North America

The foregoing organizations represent for purposes of collective bargaining under the Railway Labor Act (45 U.S.C.A. Section 151 et seq.) approximately one million railroad employees. Each of the organizations is a party to collective bargaining agreements with the nation's railroads, including union shop agreements with most of the carriers, which were entered into pursuant to the provisions of Section 2 Eleventh of the Railway Labor Act (45 U.S.C.A. § 152 Eleventh). The carriers and labor organizations are under a statutory duty to exert every reasonable effort to make and maintain such agreements and to settle all disputes with respect to their interpretation and application.

The extent to which these statutory and contractual obligations can be met within the railroad industry is directly

and vitally related to the basic issue presented in this case.

As we understand it from the stipulated facts and from the National Labor Relations Board's decision and order, this case presents the fundamental question of whether the Board was correct in holding that a tender of a delinquent initiation fee, *if made at any time prior to actual discharge,* is such a tender as to make unlawful a subsequent discharge based upon non-compliance with the time provisions of an admittedly valid union security agreement.

This holding of the Board, from which two members dissented, is of great concern to the unions in the railroad industry for the following reasons:

First, the provisions of Section 2 Eleventh of the Railway Labor Act authorizing union shop agreements in the railroad industry (45 U.S.C.A. § 152 Eleventh)[1] are similar in most respects, and identical in some, with the provisions authorizing union security agreements under the Labor-Management Relations Act (herein called the Taft-Hartley Act).

Second, the holding of the Board in this case is, in our view, in direct contravention of the applicable union security provisions of the Taft-Hartley Act and Congressional intent in enacting those provisions.

Third, the Board's ruling in the instant case actually invites and creates unfair discrimination to those employees who join and pay their initiation fees on time as required by statute and by the union security agreement.

Fourth, the Board's holding is directly contrary to uniform administration and interpretation of union shop agreements in the railroad industry, and also is contrary to previous administrative application and interpretation by

[1] These union shop provisions of the Railway Labor Act are set forth in the Appendix to this brief.

the Board of union security agreements under the Taft-Hartley Act.

Fifth, unless the holding of the Board in this case is rejected by the courts union security agreements may well become meaningless and unenforceable. If the decision were to be followed in the railroad industry, a chaotic situation could immediately result. There are now in existence on most of the nation's railroads union shop agreements which provide, among other things, that an employee must, as a condition of his continued employment by the carrier, secure and maintain his membership in the union representing his craft by tendering the initiation fees, periodic dues, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining union membership. This requirement is in express compliance with the Railway Labor Act provisions authorizing union shop agreements. If the decision of the Board in this case were applied to these agreements, it would mean that payment of an initiation fee necessary for acquiring membership—which the statute expressly authorizes may be required by agreement "within sixty days following the beginning of the employment" (or following "the effective date" of the union shop agreement, whichever is the later)—could not be compelled and no tender could be required until the moment before an actual discharge was to take place. The effect of such a rule would be to render null and void not only the time requirements of union shop agreements but the statutory provisions upon which they are based.

The problem presented by the Board's holding is particularly acute at this time because of the fact that the validity of discharges under union shop agreements in the railroad industry are submitted either to arbitration or to railroad adjustment boards, and there is an understandable disposition on the part of some arbitrators and referees to follow decisions of a quasi-judicial tribunal like the National

Labor Relations Board. Thus, it is apparent that the Board's basic holding in the instant case is of considerable importance to the functioning of union shop agreements in the railroad industry.

QUESTION PRESENTED FOR DETERMINATION

From the foregoing, it can be seen that the interest of *amicus curiae* centers on the basic holding of the Board that a tender of a delinquent initiation fee, *if made at any time prior to actual discharge,* is such a tender as to make unlawful a subsequent discharge based upon non-compliance with the time provisions of an admittedly valid union security agreement.

We wish to make it clear that we are not here concerned with any subsidiary issues which have been raised in the case, such as the alleged arbitrary refusal of the Board to consider certain additional valid defenses raised by Respondents-Cross-Petitioners (hereinafter called Respondents) over and above their principal contention that the Board's basic holding is a misconstruction of the statute. Nor are we concerned in discussing the distinction which Respondents and the two dissenting Board members draw between the instant case and the Board's holding in the *Aluminum Workers* case, 111 NLRB 411, 112 NLRB 619. While we recognize that the two cases are distinguishable because one involves the tender of an initiation fee and the other tender of periodic dues, such distinction is, in our view, superficial and unimportant because we believe the Board's ultimate holding in the *Aluminum Workers* case (112 NLRB 619) to be invalid for precisely the same reasons as their holding in the case here under review. We shall discuss the *Aluminum Workers* case on that basis rather than as have Respondents, and also show in such discussion that the Board's ultimate holding therein, upon which it relies in the instant case, was *not* enforced by the United States Court of Appeals for the Seventh Circuit, 230 F. 2d 515, as the Board appears to here claim it was.

ARGUMENT

I

THE APPLICABLE PROVISIONS OF THE TAFT-HARTLEY ACT PERMIT ENFORCEMENT OF AGREEMENTS REQUIRING THE DISCHARGE OF EMPLOYEES WHO FAIL TO MAKE TENDER OF AN INITIATION FEE WITHIN THE THIRTY-DAY PERIOD FOLLOWING THEIR EMPLOYMENT, EVEN THOUGH THE EMPLOYEE ULTIMATELY TENDERS SUCH INITIATION FEE AT A TIME PRIOR TO HIS ACTUAL DISCHARGE.

In the case here under review, the Board found that by discharging the employee involved (Hayden A. Balthrope) after he had paid his initiation fee beyond the period prescribed by the agreement and statute, Respondent Technicolor Motion Picture Corporation (herein called Technicolor) violated Section 8(a)(3) and (1) of the Taft-Hartley Act, and that by causing Technicolor to so discharge the employee, Local 683 (herein called the Union) violated Section 8(b)(1)(A) and 8(b)(2) of the statute.

In so finding and reversing the conclusion of its Trial Examiner, the Board gives no reasons or analysis of the statutory provisions upon which it relies or their legislative history except to refer to its previous holding in *Aluminum Workers International Union,* 111 NLRB 411, 112 NLRB 619, in which case the Board first announced its holding that "a full and unqualified tender made any time prior to actual discharge, and without regard as to when the request for discharge was made, is a proper tender, and a subsequent discharge based upon the request is unlawful." Reference to the Board's decision in the *Aluminum Workers* case is similarly unproductive of any analysis of the statute or its legislative history and is devoid of reasons of any substance for the conclusion there reached. Moreover, in reaching the conclusion which it initially announced in the *Aluminum Workers* case, the Board found it necessary to overrule a previous Board decision of long standing in the *Chisholm-Ryder* case, 94 NLRB 508, which was directly contrary to its holding in the *Aluminum Workers* case.

Furthermore, as briefly noted above, although the Board refers in footnote 2 of its decision in the instant case to the *Aluminum Workers case* as one which was enforced by the United States Court of Appeals for the Seventh Circuit on March 2, 1956, reference to the Court's decision, *National Labor Rel. Bd.* v. *Aluminum Wkrs. Int. Union,* 230 F. 2d 515, discloses that the Seventh Circuit expressly refrained from passing on the precise holding for which the Board cites the case, the Court finding it unnecessary to reach this issue (p. 521) because it had determined that the employee had made tender within the period allowed by the union security agreement as we shall later show in this discussion.

A. The Board Has Misinterpreted the Statute.

We believe that the Board's decision and order in the instant case were based upon a misconception of the terms and purposes of Section 8(a)(3) and 8(b) of the Taft-Hartley Act. These provisions were unquestionably designed to protect individual employees from discharge based upon discrimination made illegal by the terms of these provisions. On the other hand, the provisions are just as clearly designed to permit dismissal from service for failure to comply with the terms of an agreement requiring union membership as a condition to continued employment if the terms set forth in such agreement are authorized and valid under the statute. It strains our imagination to see how the Board can recognize the agreement in the instant case as "a valid union security agreement" under which the Board concedes the employee could have been properly discharged had the Employer acted promptly as required by the agreement, and yet conclude that simply because the Employer did not so act a late tender before actual discharge invalidates the subsequent discharge. But that is precisely what the Board has held.

The Board apparently concedes that it is perfectly lawful for a union security agreement to require an employee to

join a union within thirty days following the date of his employment, and it is admitted under the stipulated facts in this case (R. 18-21) that the union security agreement here involved so required. The Board also recognizes that the securing of such union membership is necessarily dependent upon the tender of an initiation fee. It further concedes as undisputed (R. 18-21) the failure of the employee here involved to tender such initiation fee for a period of more than three months beyond the prescribed thirty-day period for securing union membership, and the fact that the employee was aware of the union shop agreement and his obligations under it. Finally, it is undisputed that the union security agreement further provided that upon failure of an employee to secure union membership within this time prescribed by the agreement, the Employer would, within three days, discharge such employee "after receipt of written notice from the Union that any such employee is not a member as above required." The Union made such written request for discharge (R. 19, 22-23, 30-31, 61, 71-72) but the Employer failed to comply as required (R. 19-20, 31-32, 61, 72).

Up to this point, the Board seems to recognize that the terms of a valid union security agreement had not been met and that accordingly the union had a right to have the employee dismissed from service for such failure. But from this point on the Board seems to be reading into the statute something which we cannot find in it and which we believe clearly violates its expres terms and purpose. Simply because the discharge action, which was properly initiated by requestion of the Union, was postponed for several months through inaction by the Employer, and because the employee managed to tender his initiation fee—now delinquent for over three months—just prior to the effectuation of the actual discharge by the company, the Board says the discharge becomes an unlawful discrimination. We do not so read the statute, and we find nothing in the legislative history of Section 8(a)(3)

or 8(b) to support such a construction. On the contrary, both the express language of the applicable statutory provisions and their legislative history are incompatible with the Board's holding.

Section 8(a)(3) expressly permits agreements between employers and unions requiring as a condition of employment membership in a labor organization "on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . ," subject to certain limitations which do not concern the period of time within which compliance may be required. Section 8(a)(3) then continues in a proviso clause to prohibit the previously authorized termination of employment for failure to secure union membership in two situations: First, where membership is not available to the employee on the same terms and conditions as generally apply to members of the union; and second, where membership is denied "*for reasons other than the failure of the employee to tender . . . the initiation fees uniformly required as a condition of acquiring . . . membership.*" [Italics supplied.] It is not claimed in this case that either of these conditions were violated either in the terms of the union security agreement or in their application to the employee who was discharged. Consequently, it is perfectly clear that the language of the statute itself expressly permits a discharge for failure to comply with an agreement requiring acquisition of membership through tender of an initiation fee *by the thirtieth day following commencement of employment,* which the union security agreement in the instant case specifically prescribed. *Cf. Radio Officers' Union* v. *NLRB,* 347 U.S. 17.[2] Under such circumstances, the conclusion is justified that the Board is engrafting upon the statute something

[2] In this case the Supreme Court expressly said (p. 41): ". . . an employer can discharge an employee for non-membership in a union if the employer has entered into a union security contract valid under the Act with such union and if the other requirements of the proviso are met."

which not only was not included by Congress but which is directly contrary to what Congress has expressly intended and permitted. *Cf. Aluminum Co.* v. *National Labor Relations Board,* 159 F. 2d 523, at 526.

B. From 1951 Until Its Decision in 1956 in the Aluminum Workers Case, the Board Correctly Construed the Statute.

The Board does not attempt in its decision and order in the instant case to discuss or analyze the terms of the applicable statutory provisions, nor does it advance any reasons which refute the foregoing construction. It simply makes reference to its previous holding in the *Aluminum Workers* case and says that it is of the opinion that the principle there enunciated is applicable here. The trouble with this reasoning by reference is that in the *Aluminum Workers* case the Board likewise makes no analysis of the statutory provisions to support its conclusion that a tender *at any time prior to actual discharge* is a valid tender.

Such reluctance by the Board to support its holding by statutory analysis is in striking contrast to the way in which the Board previously considered the same issue in 1951 in the *Chisholm-Ryder Co.* case, 94 NLRB 508, 28 LRRM 1062—which it summarily overruled without advancing reasons therefor by its decision in the *Aluminum Workers* case. We think the Board correctly construed the statute as it bears on the issue here presented in the *Chisholm-Ryder* decision, and that it was wrong in reversing that decision and interpreting the statute as it does in the case now under review. For this reason we believe a detailed discussion of the Board's decision in the *Chisholm-Ryder case* would be helpful.

By this decision the Board squarely held that the belated tender of dues prior to union expulsion and prior to actual discharge did not preclude termination of employment for failure to pay dues as periodically required

by the union and as uniformly applied to all its members. Although the problem in the instant case concerns the timely tender of an initiation fee rather than the tender of periodic dues, the issue involved is in principle the same—i.e., compliance *within the time* prescribed by the agreement. When the contention was made in the *Chisholm-Ryder* case that a tender of dues prior to actual discharge precludes such discharge, the Board answered it as follows (28 LRRM 1062, 1063-1064):

> "Turning to the General Counsel's second argument, it is contended that the Act, in any event, prohibited Cavicchia's discharge, because prior thereto he tendered his delinquent dues to the Union. We do not so read the Act.
>
> "Section 8(a)(3), which authorizes the execution of union-shop agreements under specified conditions and permits discrimination to that extent, provides in pertinent part:
>
> "'That no employer shall justify any discrimination against an employee for nonmembership in a labor organization * * * (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee *to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.* (Emphasis added.)'
>
> "Correspondingly, Section 8(b)(2) makes it an unfair labor practice for a labor organization or its agents to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure *to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.* (Emphasis added).
>
> "It is clear that to entitle an employee to protection under these provisions where, as here, the union is not otherwise improperly motivated in seeking his discharge, the employee is obligated to tender 'the *pe-*

riodic dues * * * uniformly required as a condition of * * * retaining membership.' The quoted phrase plainly contemplates not only that the tender be in an amount uniformly prescribed by the union, but also that it be made within the time uniformly allowed by the union as a condition of retaining membership. Whatever legislative history there is concerning the timeliness of the tender confirms the plain meaning of the text. Thus, speaking of the union-security provisions of the Senate bill, which the conferees later adopted in material part [H. Conf. Rep. No. 510, 80th Cong. 1st Sess. (1947), 41], the Senate Majority Report stated that these provisions were designed to safeguard an employee from compulsory discharge under a union-security agreement' if the worker is not *delinquent* in paying his initiation fees and dues.' (Emphasis added.) [S. Rep. No. 105, 80th Cong., 1st Sess. (1947), 7.] That which was implicit in the Senate amendments was expressly provided in the House bill. [H.R. 3020, 80th Cong., 1st Sess. (1947.] Section 8(d)(4) of the House bill stated that no union-security agreement 'may have the effect of denying employment or continued employment to any individual who on or *before the time required* tenders to the organization the initiation fees and dues regularly imposed as a condition of membership therein.' (Emphasis added.) The House Conference Report did not note any difference in the import of the language used in the Senate and House bills.

"In the circumstances, to hold, as the General Counsel urges, that proviso B to Section 8(a)(3) and Section 8(b)(2) permit employee-members subject to a valid union-shop agreement to disregard with impunity the union's uniform requirements respecting the time for payment of *'periodic'* dues as a condition of retaining membership would be a distortion of the manifest sense of these sections. Moreover, such an interpretation would materially detract from the substance of union-security agreements which Congress vouchsafed to unions and would leave individual employees free to ignore an important condition of membership, which unions are permitted to impose. [It is worthy to note that membership in a labor organization, being contractual in nature, contemplates the

faithful performance of membership obligations imposed by the organization's constitution and bylaws in the manner therein provided.] In the absence of a clear expression of Congressional intent to that effect, we are not persuaded that such a construction is warranted.

"In the present case, Cavicchia failed to perform his statutory obligation to tender his periodic dues within the time uniformly required as a condition of retaining his membership. As a consequence, he became vulnerable to discharge under the Respondents' union-shop agreement, upon his expulsion from the Union. [As Cavicchia was discharged following his expulsion from the Union, we find it unnecessary to determine, as did the Trial Examiner, whether the union-shop agreement involved in this case also permitted his discharge if he had only lost membership 'in good standing.' Cf. Firestone Tire and Rubber Company, 92 NLRB No. 204 (27 LRRM 1275).] As the Union's constitution and bylaws did not provide for the restoration of membership rights or prevent expulsion on payment of delinquent dues, [Indeed, under the Union's constitution, special dispensation by the International president is necessary to restore a delinquent member to good standing after automatic suspension for nonpayment of dues. There is no evidence that Cavicchia received this dispensation.] Cavicchia's unaccepted belated tender could not bar his discharge. This conclusion is in harmony with the well-established legal principle that a tender to be effectual must be made within the time fixed by law or contract as the case may be. [6 Williston on Contracts Sec. 1810.]"[3]

We submit that the foregoing discussion by the Board in 1951 of the statutory provisions here involved and their legislative intent was clearly correct, and that the Board's departure from such observations in the instant case is a distortion of the statutory language and its mainfest purposes.

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[3] Material enclosed in brackets in the quoted passages from the Board's opinion are footnotes of the Board to its decision. Italicized portions of the decision are the Board's emphasis.

C. Previous Court Decisions Have Not Pased Upon the Issue Here Presented.

Although the issue under discussion has never been directly passed upon by any court, what has been said by the Supreme Court and other Circuit Courts in decisions dealing with other issues arising under Section 8(a)(3) and 8(b) of the Taft-Hartley Act is compatible with the conclusions reached by the Board in the *Chisholm-Ryder* case and opposed to the view which it is here advancing. *Cf. Radio Officers' Union* v. *NLRB,* 347 U.S. 17; *Union Starch and Refining Co.* v. *NLRB,* 186 F. 2d 1008 (7th Cir.), *cert. den.* 342 U.S. 815.

Earlier in this brief we referred to the fact that in footnote 2 of its decision and order in the instant case the Board cites its two decisions in the *Aluminum Workers* case (111 NLRB 411; 112 NLRB 619) as enforced by the United States Court of Appeals for the 7th Circuit. Actually the Circuit Court did not enforce or even pass upon the specific holding by the Board upon which it relies in the instant case—i.e., that a tender made at any time prior to actual discharge is a proper tender making subsequent discharge unlawful. For this reason, it is desirable to discuss just what was involved in the *Aluminum Workers* case and the holdings of the Board which the Court actually sustained.

The *Aluminum Workers* case involved a union member who had become delinquent in his dues and whose original tender of dues was rejected without legal justification because they were paid by mail instead of at a union meeting. It also involved a second tender by the employee at the union meeting which was rejected because it was unaccompanied by a $15.00 reinstatement fee. Finally, it involved a third tender by the employee of current and delinquent dues and the specified $15.00 reinstatement fee after discharge had been requested by the union but before the union had actually expelled the employee from membership.

In its decision the Board made the following holding: First, it held that the employee had made a proper tender of dues as required by the union security agreement which had been improperly refused by the union because it was made by mail instead of at a union meeting, and the Board concluded that by this refusal the union had waived whatever right it might have had to insist upon a reinstatement fee. Secondly, the Board held that since it was the practice of the union and the company *under their union security agreement* not to act upon requests for discharge until the union itself had expelled a delinquent member (thus denoting the employee a member not in good standing under the agreement and thus subject to discharge), the full tender of dues by the employee plus a reinstatement fee *prior to expulsion by the union* was a valid tender under the agreement, making subsequent discharge unlawful.

As we shall later show, the Seventh Circuit Court of Appeals sustained both of these holdings by the Board. But in its decision upon reconsideration (112 NLRB 619) the Board went further and held the discharge unlawful on a third ground, namely, because a tender made *at any time prior to actual discharge*—irrespective of the other considerations previously discussed—was valid in and of itself, making subsequent discharge unlawful. This third ground the Seventh Circuit Court of Appeals expressly refrained from sustaining, holding it unnecessary to the decision.

Here are the Court's observations in pertinent part in support of the foregoing analysis. With respect to the first of the Board's three holdings, the Court said (230 F. 2d 515, 519-520):

> "We think the Board correctly held that the September 9 tender was sufficient. Boness was notified by the notice posted in the plant that her dues were two months in arrears. Shortly thereafter, on September 9, she tendered the customary dues for the third quarter of 1952. This tender was refused because it was made by mail and not at 'a union meeting.' The tender

was made to and refused by an officer empowered by respondent to collect dues, whose act was that of respondent. Boness was not then advised that she owed a reinstatement fee; there was no intimation that the amount of the tender was insufficient to discharge all her obligations to respondent. *The reinstatement fee was not brought into the picture until several weeks later, after respondent had been advised by its attorney that its position in refusing the tender was untenable.*

"Under these circumstances, the Board properly found that respondent had waived its right to demand a reinstatement fee.

* * * * *

". . . Nonpayment of dues is the one exception to the statutory provision forbidding discriminatory discharge of an employee. It has been stated that 'the policy of the Act is to insulate employees' jobs from their organizational rights,' Radio Officers' Union of Commercial Telegraphers Union, A.F.L. v. N.L.R.B., 347 U.S. 17, at page 40, 74 S. Ct. 323, at page 335, 98 L. Ed. 455, and 'to prevent utilization of union security agreements except to compel payment of dues and initiation fees.' Union Starch & Refining Co. v. N.L.R.B., 7 Cir., 186 F. 2d 1008, 1012, 27 A.L.R. 2d 629, certiorari denied 342 U.S. 815, 72 S. Ct. 30, 96 L. Ed. 617; Radio Officers Union of Commercial Telegraphers Union, A.F.L. v. N.L.R.B., 347 U.S. at page 41, 74 S. Ct. at page 336. The record does not present the usual 'free-rider' situation with which the discharge provisions of the Act were designed to cope. Boness' acts reveal a willingness to pay her way, with no evidence of delinquency prior to the inception of the present dispute. And in that controversy, the only conclusion justified by the record before us is that she was willing at all times to pay her own way and that she tendered her third quarter's dues promptly, in accord with her belief as to the due date. The whole record evinces her good faith throughout the controversy, and it was respondent's duty to accord to her a like good faith and either to accept the tendered dues or to advise her specifically of its requirements in that respect. Had respondent accepted the September 9

tender, it could not alwfully have demanded her discharge. And, assuming, arguendo, that respondent, at that time, might lawfully have demanded a reinstatement fee as a condition for Boness' continued employment, this right was waived, we think, when it refused her tender on a ground which was legally untenable."

In upholding the second of the Board's three holdings, the Court said (p. 520):

"We think, also, that the order is supported upon the second ground assigned by the Board on reconsideration. Assuming, without deciding, that, upon the circumstances of this case, Boness' continued employment might well be conditioned upon payment of the reinstatement fee, respondent's demand for her discharge was nevertheless a violation of the Act. When respondent first demanded Boness' discharge, the company interpreted its contract with the union as requiring expulsion as a condition for discharge for nonpayment of dues. Respondent's acquiescence in this interpretation is shown by its subsequent action in formally expelling Boness on November 12, and, thereafter, submitting a new demand for her discharge. In the meantime, on November 7, Boness tendered three money orders to respondent in an aggregate amount equalling her dues for the last six months of 1952 and the full reinstatement fee which respondent had demanded. Thus, prior to her expulsion and the operative demand for her discharge, she had tendered to respondent every cent it had demanded for reinstatement. This tender also was refused, and subsequently her expulsion was effected. Against this background of Boness' attempts to pay her way, respondents' action in demanding her discharge becomes the more suspect, and it would appear that 'nonpayment of dues' was asserted as a lily-white front to cloak a demand for her discharge based on some other reason best known to respondent's officials."

But with respect to the third ground in its decision upon reconsideration, which is the "principle" announced upon which the Board relies in the instant case, the Court not

only did not uphold such ground but did not even discuss it. Instead, the Court said (page 521):

> "In the view we take of this cause, we see no reason to consider other points advanced by the Board and by amicus curiae."

Amicus curiae in the *Aluminum Workers* case before the Seventh Circuit was the Railway Labor Executives' Association, as is the case before this Court. There, as here, we specifically disclaimed any interest in any of the factual issues in the case and restricted our brief exclusively to the Board's broad holding that a tender at any time prior to actual discharge is valid making subsequent discharge unlawful. That the Seventh Circuit thus did not decide or reach the issue here involved is clear beyond question.

II

DECISIONS OF NEUTRAL ARBITRATORS IN DISCHARGE CASES ARISING UNDER THE RAILWAY LABOR ACT ARE OPPOSED TO THE BOARD'S HOLDING IN THE INSTANT CASE.

As we stated at the outset of this brief, the provisions of Section 2 Eleventh of the Railway Labor Act authorizing union shop agreements in the railroad and airline industries (45 U.S.C.A. Section 152 Eleventh), which provisions are set forth in the Appendix to this brief, are substantially the same as those contained in the Taft-Hartley Act. To the limited extent that the precise issue here under discussion has arisen before neutral arbitrators considering railroad union shop discharge cases, these arbitrators have consistently held that the time limitations prescribed in union shop agreements must be met, if the agreement is otherwise valid under the Railway Labor Act, and that a tender of initiation fees or dues beyond the period prescribed by the agreement but before actual discharge will not invalidate the discharge.

In *Kansas City Terminal Railway Co.,* 21 Labor Arbitration Reports 487, wherein the employees involved failed to join the union within the period specified under the

union shop agreement but subsequently made a belated tender of initiation fees and dues, the arbitrator held them to be in non-compliance, and observed (p. 488):

> "In none of the three cases did the Appellants challenge the computation of the sixty-day period or the terminal date by which an appropriate tender of an application for membership together with the necessary fees had to be made. In another decision issued this date it was decided that for employees performing compensated service on March 1 the proper terminal date was April 30. Since no issue was raised in any of the three cases as to the appropriate terminal date of the sixty-day period, it is assumed that April 30 is the proper date.
>
> "In all three cases the Appellants did not, in any legal or equitable sense, offer any defense to the action of the Brotherhood under the provisions of Section 1 of the agreement of February 12. At best, the Appellants cited mitigating circumstances why they failed to comply.
>
> "Appellants did not allege that the Brotherhood had accepted applications for membership on or after May 1 from any other similarly situated employees, nor was it shown in any other proceeding that the Brotherhood had so acted. *Since there has been no waiver by the Brotherhood of this sixty-day period, and since no defense, in law or in equity, was submitted by Appellants, the Arbitrator would be substantially altering the agreement of the parties, which is unwarranted, if he were not to abide by the specific time period of the agreement. It is for the Brotherhood alone to decide whether to demand strict compliance.*" (Italics supplied).

In another unreported decision by Arbitrator John Day Larkin involving a request by the Brotherhood of Railway and Steamship Clerks for the discharge of two employees by the Illinois Central Railroad, the same issue of failure to make timely tender of initiation fee and dues was involved. The facts were briefly as follows: The union shop agreement required acquisition of union membership within

a period of sixty days following employment. The two employees did not join within the prescribed period. Some months later, both employees offered to join and tendered the initiation fee but refused to pay dues covering the preceding months to the date when they were obligated by the agreement to become members. The union refused to accept the initiation fee and initial month's dues only, and demanded their discharge by the railroad. The railroad took the position that by offering to pay the initiation fee and union dues prior to being discharged the employees had not violated the agreement. On appeal of the matter by the union to the arbitrator, it was decided that the time requirements of the agreement must be complied with, that a failure to join within such prescribed period placed the employees in non-compliance with the agreement and subject to discharge, that such action was valid, and that the union was justified in insisting on the back months' dues in exchange for a waiver of its right to have the employees discharged. In so holding, Arbitrator Larkin said:

> "Finally, the parties' Agreement requires that all employees must join the Union 'within sixty calendar days after the date they first perform compensated service as such employees after the effective date of this Agreement . . .' (Section 1, Agreement of February 4, 1953.) We cannot sustain the Carrier's position in this case without disregarding the plain meaning of the Agreement and in effect rewriting it. The Arbitrator has no authority to make any such modification.
>
> "However, since Feist and Johnson have been mistaken in their position, we might suggest that the parties allow them a period of thirty days in which to correct their error. If they have not taken steps to join and pay their dues, *retroactive to September 1, 1954,* within thirty days following the effective date of this award, the Carrier is obligated to terminate their services." [Italics supplied.]

The foregoing not only supports the position for which we are contending on the issue under review, but it also

serves to illustrate another fallacy in the conclusion by the Board that the parties in the instant case have been guilty of unfair discrimination under the Taft-Hartley Law by discharging employee Balthrope after he made a belated tender of the initiation fees prior to his actual discharge. If such a holding were upheld, the actual discrimination would be visited upon all those employees who joined the union within the time required by the terms of the union security agreement and paid dues during the months which Balthrope would be escaping the payment of dues simply by waiting until the time of his actual discharge before tendering his initiation fee.

CONCLUSION

For the foregoing reasons, we respectfully submit that there is no authority by statute or decisions of the courts to support the Board's holding that a tender of an initiation fee at any time prior to actual discharge renders invalid a subsequent discharge made in compliance with a union security agreement which is conceded to be lawful under the Taft-Hartley Act.

Briefly summarizing, the union security agreement here involved required the employee Balthrope to secure union membership within thirty days following his employment, and further provided that for failure to do so he would be discharged within at least three days after written notification by the Union to the Employer of his non-compliance. The employee with knowledge of the agreement and his obligations under it failed without justifiable excuse to apply for membership and tender his initiation fee for more than three months beyond the prescribed period for securing such membership. The Union notified the Employer in writing upon expiration of the thirty-day period of the employee's non-compliance and requested his discharge by the time specified in the agreement. The Employer failed to comply for a period of over five months when it finally discharged the employee despite repeated

requests by the Union to comply with the requirements of the agreement. Such inaction by the Employer does not create any additional legal rights for the employee, and his belated application for membership and tender of initiation fee immediately prior to his discharge creates no rights under the agreement or the applicable statute to his retention in service. The Board's decision to the contrary is a misconstruction of the statute and invalid.

The Board's petition for enforcement of its decision and order should be denied, and the order should be vacated by this Court as invalid.

Respectfully submitted,

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APPENDIX

Section 2 Eleventh of the Railway Labor Act (45 U.S.C.A. § 152 Eleventh) reads as follows:

Eleventh. (45 U.S.C. § 152 as added by Act of January 10, 1951, 64 Stat. 1238.) Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided,* That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor

organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subapargraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any one of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of section 2 of this Act in conflict herewith are to the extent of such conflict amended.

No. 15298

United States
Court of Appeals
for the Ninth Circuit

RETAIL FRUIT & VEGETABLE CLERKS UNION, LOCAL 1017 and RETAIL GROCERY CLERKS UNION, LOCAL 648, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,

Petitioners, Respondents,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent, Petitioner.

Transcript of Record

Petition to Review and Set Aside and Petition for Enforcement of an Order of the National Labor Relations Board.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-9-57

No. 15298

United States
Court of Appeals
for the Ninth Circuit

RETAIL FRUIT & VEGETABLE CLERKS UNION, LOCAL 1017 and RETAIL GROCERY CLERKS UNION, LOCAL 648, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Transcript of Proceedings—(Continued)

Witnesses—(Continued)

GENERAL COUNSEL'S EXHIBIT No. 1-A

United States of America
National Labor Relations Board

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

Case No. 20-CC-106. Date Filed: 2/16/55.

1. Labor Organization or Its Agents Against Which Charge Is Brought: (1) Retail Fruit & Vegetable Clerks' Union No. 1017

(2) Grocery Clerks' Union No. 648.

Address: (1) 821 Market Street, San Francisco, California.

(2) 1968 Mission Street, San Francisco, California.

The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of Section (8b) Subsection(s) (1) (A) (4) (A) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge:

On or about February 15, 1955, they, by their officers and agents, have restrained and coerced employees of members of the Retail Fruit Dealers Association of San Francisco, Inc., in the exercise of the rights guaranteed in Section 7, by threatening said employees with blacklisting in employment in the event that they did not observe picket lines established at the Crystal Palace Market by the aforesaid unions.

Since on or about February 15, 1955, the aforesaid unions have engaged in and have induced and encouraged employees of: D. Z. D. Produce, W. Gummow, Roseann, Peninsula Fruit, Nu-Way Produce, and E. Gummow, members of the Retail Fruit Dealers Association of San Francisco, to engage in the strike or concerted refusal to perform any services, with the object of forcing and requiring the aforesaid members of the Retail Fruit Dealers Association of San Francisco, Inc., to cease doing business with the J. M. Long Company.

Name of Employer: Retail Fruit Dealers Association of San Francisco, Inc., and its members.

4. Location of Plant Involved: 1175 Market Street, San Francisco, California.

5. Type of Establishment: Retailer.

6. Identify Principal Product or Service: Fruits and vegetables.

7. No. of Workers Employed: Approx. 400.

8. Full Name of Party Filing Charge: Retail Fruit Dealers Association of San Francisco, Inc.

9. Address of Party Filing Charge: 2420-A Lombard Street, San Francisco, California.

10. Tel. No. JO 7-3456.

11. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

Date: February 16, 1955.

/s/ By VICTOR J. CORSINI
Executive Secretary

Affidavit of Service by Mail and Postal Return Receipts Attached.

GENERAL COUNSEL'S EXHIBIT No. 1-C

United States of America
Before The National Labor Relations Board
Twentieth Region

Case No. 20-CC-106

In the Matter of RETAIL FRUIT & VEGETABLE CLERKS' UNION, LOCAL 1017, and RETAIL GROCERY CLERKS' UNION, LOCAL 648, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL, and RETAIL FRIUT DEALERS' ASSOCIATION OF SAN FRANCISCO, INC.

COMPLAINT

It having been charged by Retail Fruit Dealers' Association of San Francisco, Inc., that Retail Fruit & Vegetable Clerks' Union, Local 1017 herein called Respondent Local 1017), and Retail Grocery Clerks' Union, Local 648 (herein called Respondent Local 648), both affiliated with Retail Clerks International Association, AFL, have engaged in, and are engaging in, unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C.A. 141 et seq. (Supp. July, 1947), herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the Regional Director for the Twentieth Region, designated by the Board's Rules and Regulations,

Series 6, as amended, Section 102.15, hereby issues this Complaint and alleges as follows:

I.

(a) Retail Grocers Associations of San Francisco, Ltd., herein called Grocers Association, is a non-profit California corporation, with its main office and principal place of business located at 525 Market Street, San Francisco, California;

(b) Grocers Associations, among its other functions, has been designated and recognized as the sole collective bargaining agency for a multi-employer unit to represent and sign collective bargaining agreements with labor organizations, including Respondent Local 648, covering wages, hours, and working conditions for certain employees of the below-named employers:

(1) Approximately 275 member employers of said Grocers Association who have furnished powers of attorney to said Grocers Association, as agent, to negotiate and execute collective bargaining agreements on their behalf with Respondent Local 648;

(2) Employers referred to herein as other employers, who participate in negotiations between said Grocers Association and Respondent Local 648 and who have signified in writing their intention to be bound by the results of such negotiations;

(c) Member employers of the Grocers Association, including the aforesaid other employers, operate approximately 350 retail grocery stores located in San Francisco, Colma, Daly City and Brisbane, California. During the year 1954, and annually, member employers of the Grocers Asso-

ciation, and the other employers, purchased and received grocery and other products, by value in excess of $25,000,000, of which amount, by value in excess of $5,000,000 was received indirectly, in the flow of commerce from place and points located outside the State of California.

II.

(a) Retail Fruit Dealers' Association of San Francisco, Inc., herein called Fruit Association, is a non-profit cooperative California corporation, with its main office and principal place of business located at 2418 Lombard Street, San Francisco, California, which, among its other functions, engages in multi-employer bargaining with powers of attorney, as agent, to sign collective bargaining agreements with labor organizations, including Respondent Local 1017, covering wages, hours, and working conditions for certain employees of its member employers. The approximately 150-160 member employers of said Fruit Association are engaged in the business of buying and selling at retail fruits and vegetables within the City and County of San Francisco, State of California.

III.

The Grocers Association and the Fruit Association, and each of them, are Employers within the meaning of Section 2 (2) of the Act.

IV.

Respondent Local 1017 and Respondent Local 648, and each of them, are labor organizations within the meaning of Section 2 (5) of the Act.

V.

Crystal Palace Market, herein called the Market, located at 1175 Market Street, San Francisco, California, is a public market wherein approximately fifty (50) independent concessionaires lease and operate retail groceries, retail fruit and vegetable stores, delicatessen, and the like. The J. M. Long & Co., Inc., herein called Long, a member of Grocers Association, owns the Market, and, among its other functions, operates a retail grocery store therein.

VI.

Donald Z. Donabedian, an individual, d/b/a DZD Produce Company; Warren Gummow, an individual, d/b/a E. Gummow & W. Gummow Produce Company; Rose Misuraca, an individual, d/b/a Roseann's; B. Mastorana, an individual, d/b/a Peninsula Fruit; P. Giannini, an individual, d/b/a Nu-Way Produce, and each of them, are retail fruit and vegetable dealers who employ members of Respondent Local 1017 and operate retail fruit and vegetable stands and concessions at the Market, and each of them, at all times material herein, were members of the Fruit Association.

VII.

At all times material herein, Respondent Local 648 has had a labor dispute with Grocers Association concerning the wages, hours, and other terms and working conditions of the employees of the latter's members.

VIII.

At no time material herein has Respondent Local 648 or Respondent Local 1017 had a labor dispute with members of Fruit Association, or any employers at the Market except members of Grocers Association concerning the wages, hours, or working conditions of their employees.

IX.

Beginning on or about February 15, 1955, Respondent Local 648 picketed all entrances to the Market and refused to picket only inside the Market at the stands of the employer members of Grocers Association.

X.

Beginning on or about February 15, 1955, Respondent Local 1017, acting by and through its officers, agents and representatives, by picketing, and by orders, directions, instructions, appeals, and threats of reprisals, induced and encouraged its members, employed at the Market by members of Fruit Association including DZD Produce Company, E. Gummow & W. Gummow Produce Company, Roseann's, Peninsula Fruit, and Nu-Way Produce, and employees of other employers, with whom neither Respondent Local 648 or Respondent Local 1017 had any dispute, not to cross the picket line of Respondent Local 648.

XI.

By their conduct set forth in paragraphs IX and X, above, Respondent Locals 648 and 1017, acting by and through their officers, agents, and represen-

tatives, and each of them, have induced and encouraged the employees of DZD Produce Company, E. Gummow & W. Gummow Produce Company, Roseann's, Peninsula Fruit, and Nu-Way Produce, and other employers at the Market, with whom neither Respondent had any dispute, not to perform services for their employers, an object thereof being to force or require the aforementioned employer members of the Fruit Association at the Market, and other employers, to cease doing business with Long and other employer members of Grocers Association at the Market.

XII.

Commencing on or about February 15, 1955, Respondent Local 1017, acting by and through its officers, agents, and representatives, did threaten employees that if they worked behind the picket line they would be blacklisted in the union so that they would never work in a union shop again.

XIII.

By the acts and conduct set forth in paragraphs IX, X, and XI, above, and by each of said acts, Respondent Locals 648 and 1017, and each of them, did thereby engage in, and are thereby engaging in, unfair labor practices within the meaning of Section 8 (b) (4) (A) of the Act.

XIV.

By the acts set forth in paragraph XII, above, Respondent Local 1017 has restrained and coerced employees, and is restraining and coercing employees, in the exercise of their rights guaranteed

in Section 7 of the Act, and did thereby engage in, and is thereby engaging in, unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act.

XV.

The acts and conduct of Respondent Locals 648 and 1017, as set forth in paragraphs IX, X, XI, and XII, above, occurring in connection with the operations of the Grocers Association, as described in paragraph I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

XVI.

The acts of Respondent Locals 648 and 1017, as set forth in paragraphs IX, X, XI, and XII, above, constitute unfair labor practices affecting commerce within the meaning of Section 8 (b) (4) (A), 8 (b) (1) (A), and Section 2 (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, on this 25th day of April, 1955, issues this, his Complaint, against Retail Fruit & Vegetable Clerks' Union, Local 1017, and Retail Grocery Clerks' Union, Local 648, affiliated with Retail Clerks International Association, AFL, the Respondents named herein.

/s/ GERALD A. BROWN

Regional Director, National Labor Relations Board, Twentieth Region.

GENERAL COUNSEL'S EXHIBIT No. 1-G

[Title of Board and Cause.]

ANSWER TO COMPLAINT

Come now Retail Fruit and Vegetable Clerks Union, Local 1017, and Retail Grocery Clerks Union, Local 648, Retail Clerks International Association, A.F.L., and, answering the complaint herein, admit, deny and aver as follows:

I.

Respondents allege that they are without knowledge as to the allegations contained in Paragraphs I, II, VI and VII of said complaint and, therefore, deny the same; except that as to Subparagraph (b) of Paragraph I, Respondent Local 648 admits that it has recognized the Grocers Association as the sole collective bargaining agency for a multi-employer unit as described in said Subparagraph (b) of Paragraph I.

III.

Deny the allegations of Paragraph III of said complaint, except that Respondent Local 648 admits that the Grocers Association is an employer within the meaning of the Act.

IV.

Deny the allegations of Paragraphs VIII, IX, X, XI, XII, XIII, XIV, XV and XVI of said complaint.

Respondents, Further Answering the Complaint and as a First Defense, Allege:

That the complaint is insufficient in law upon the face thereof; that the complaint fails to set forth facts sufficient to constitute a violation of any provision of the said Act; that the complaint fails to charge the respondent with the commission or omission of any act in violation of said Act, nor does it give to the respondents with sufficient definiteness or certainty notice of any particular charge or offense under said Act to enable the respondents to make proper defense thereto.

Respondents, Further Answering the Complaint and as a Second Defense, Allege:

That the National Labor Relations Board and all of its agents, employees and servants are without jurisdiction with respect to said complaint in that there is no labor dispute affecting commerce within the meaning of the Act.

Respondents, Further Answering the Complaint and as a Third Defense, Allege:

That all of the acts and activities of respondents and the members thereof with respect to the Crystal Palace Market referred to in said complaint during all of the times mentioned in said complaint were in exercise of rights guaranteed to the respondents by the First and Fifth Amendments to the Constitution of the United States and were entirely and completely lawful and are specifically and expressly permitted under the provisions of Section 8(c) of the Act.

Wherefore, respondents pray that the complaint issued herein be vacated, set aside and dismissed.

CARROLL, DAVIS & BURDICK,
/s/ By ROLAND C. DAVIS,
Attorneys for Respondents

Duly Verified.

Affidavit of Service by Mail Attached.

GENERAL COUNSEL'S EXHIBIT No. 1-H

[Title of Board and Cause.]

AMENDMENT TO ANSWER TO COMPLAINT

Come now Retail Fruit and Vegetable Clerks Union, Local 1017, and Retail Grocery Clerks Union, Local 648, Retail Clerks International Association, A.F.L., and amend Paragraph I of their answer to the complaint herein to read as follows:

I.

Respondents allege that they are without knowledge as to the allegations contained in Paragraphs I, II, V, VI and VII of said complaint and, therefore, deny the same; except that as to Subparagraph (b) of Paragraph I, Respondent Local 648 admits that it has recognized the Grocers Association as the sole collective bargaining agency for a multi-employer unit as described in said Subparagraph (b) of Paragraph I.

CARROLL, DAVIS & BURDICK,
/s/ By ROLAND C. DAVIS,
Attorneys for Respondents

[Title of Board and Cause.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Robert V. Magor, for the General Counsel. Carroll, Davis & Burdick, by Roland C. Davis, of San Francisco, Calif., for Respondents.

Before: Martin S. Bennett, Trial Examiner.

Statement of the Case

This proceeding is brought under Section 10 (b) of the National Labor Relations Act, 61 Stat. 136, herein called the Act, and stems from a complaint issued by the General Counsel of the National Labor Relations Board against Retail Fruit and Vegetable Clerks' Union, Local 1017, and Retail Grocery Clerks' Union, Local 648, both affiliated with Retail Clerks International Association, AFL, herein called Respondents and Local 1017 and Local 648, respectively. The complaint, dated April 25, 1955, alleged that Respondents had engaged in unfair labor practices within the meaning of Section 8 (b) (4) (A) and 8 (b) (1) (A) of the Act. Copies of the complaint, the charge upon which it was based, and notice of hearing thereon, were duly served upon Respondents. In their duly filed answer, Respondents denied the commission of any unfair labor practices; challenged the jurisdiction of the Board; and claimed that the activities of Respondents at issue herein were protected under the Act and the Constitution of the United States.

Pursuant to notice, a hearing was held in San

Francisco, California, on May 17, 18, and 24, 1955, before the undersigned duly designated Trial Examiner. All parties were represented by counsel who were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce relevant evidence. A motion by Respondents to dismiss the complaint was denied at the conclusion of the General Counsel's case. The motion was renewed at the close of the hearing, ruling was reserved, and it is hereby denied. At the conclusion of the hearing, the parties were afforded an opportunity to argue orally and to file briefs. Oral argument was presented and briefs were waived.

Upon the entire record in the case, and from my observation of the witnesses, I make the following:

Findings of Fact

I. The business of the employers

Retail Grocers Association of San Francisco, Ltd., herein called Grocers Association, is a trade association whose membership is comprised of approximately 500 retail grocers in the San Francisco area. Save for a few establishments located in adjoining San Mateo County, all are located in the city of San Francisco. This group operates approximately 555 grocery stores. At least some of the stores operated by the members of this trade association also contain fruit departments which are operated by other entrepreneurs, this apparently being a common form of business venture among independent retail markets.

Since 1937, Grocers Association has entered into

association-wide collective bargaining agreements in behalf of its members with Local 648. As part of this identical bargaining procedure, it has also bargained for nonmembers who have given it powers of attorney, as is the practice among its members. Some of the 500 members of Grocers Association do not have any employees, the result being that the bargaining negotiations in practical effect are carried on in behalf of 275 to 300 members and nonmembers who operate approximately 360 stores, although the contracts do become applicable to members having no employees at such time or times as their operations expand, temporarily or permanently, to a point where employees are hired.

During the year 1954, members of Grocers Association and those other employers for whom Grocers Association bargains in one broad unit purchased for the approximately 360 stores which they operate, groceries and other products valued in excess of $25,000,000, of which, products valued in excess of $5,000,000 were received indirectly in the flow of commerce from points outside the State of California.

I find that the operations of Grocers Association, its members, and those employers for whom it bargains in one industry-wide unit affect commerce within the meaning of the Act. N. L. R. B. v. Gottfried Baking Co., Inc., 210 F. 2d 772 (C. A. 2); Leonard v. N. L. R. B., 197 F. 2d 435, 205 F. 2d 355 (C. A. 9); Katz v. N. L. R. B., 196 F. 2d 411 (C. A. 9); Motor Truck Association of Southern California, 110 NLRB No. 263; Insula-Contractors

of Southern California, Inc., 110 NLRB No. 105; Capital District Beer Distributors Association, 109 NLRB No. 36; and Niagara Beer Distributors Association, 108 NLRB No. 217. See Hogue and Knott Supermarkets, 110 NLRB No. 68, and Central Cigar & Tobacco Co., 112 NLRB No. 140.

Retail Fruit Dealers' Association of San Francisco, Inc., herein called Fruit Association, is a trade association comprised of approximately 150 to 160 employers who operate retail fruit and produce stands in the city of San Francisco. This association has engaged in multi-employer collective bargaining in behalf of its members with Local 1017 since 1937.[1]

II. The Labor organizations involved

Retail Fruit & Vegetable Clerks' Union, Local 1017, and Retail Grocery Clerks' Union, Local 648, both affiliated with Retail Clerks International Association, AFL, are labor organizations admitting to membership the employees of members of the employers.

III. The Unfair labor practices

A. The issue.

The principal issue presented is whether the two respondent unions, by picketing at the premises

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[1] The foregoing findings are based upon the uncontroverted and credited testimony of Francis Tissier, secretary of Grocers Association; the uncontroverted and credited testimony of Victor Corsini, executive secretary of Fruit Association; and upon allegations of the complaint which have been stipulated to be true.

of Crystal Palace Market, a large food retailing establishment covering approximately 4 acres in the city of San Francisco, including a parking lot, have, to paraphrase the language of the statute, induced or encouraged the employees of any employers to refrain from performing services with the object of requiring employers to stop doing business with other persons. A subsidiary issue is whether Respondent Local 1017 unlawfully threatened employees with loss of employment if they crossed a picket line established at said Crystal Palace Market.

B. The situs.

A description of the business arrangement under which Crystal Palace Market is operated and of the premises may be of assistance at this point, prior to a consideration of the contentions of the General Counsel herein.

Crystal Palace Market is a large food retailing and service establishment located in a building owned by J. M. Long and Company, Inc., herein called Long. This building has but one story with all of its retail and service ventures on the main floor, save for a beauty parlor located on a mezzanine; the offices of Long are also located on this messanine. The building, together with its adjacent parking lot, covers almost 4 acres and contains retail stands or departments which deal in groceries, delicatessen products, creameries, bakery goods, liquors and tobaccos. There are various service stands such as shoe repair and a locksmith. Other

departments are two cocktail bars, restaurants, and an appliance store.

Long actually operates only four of the approximately 64 operations or concessions found in this one-story building, these being two liquor and tobacco departments, the appliance store, and a self-service grocery store; this grocery store is operated under the Long name. All other stands or stores are operated by intrepreneurs who lease their respective premises from J. M. Long and Company, Inc., on a monthly basis, either party being entitled to cancel the lease on 30-day notice. These leases provide for a rental based upon a percentage of receipts coupled with a minimum monthly rate. They are silent as to any control by Long over the labor relations of its tenants.

The various retailing operations of Long on these premises, namely liquor, tobacco, appliances, and the grocery, are under the supervision of John E. Green, general manager for Long in charge of retail operations. The entire premises of Crystal Palace Market are under the supervision of Sidney A. Haag, general manager and vice president of the concern. Both have offices at Crystal Palace Market.

Vital to an appreciation of the problems posed herein is the physical layout of the building which is shaped roughly in the form of a T and can be entered from 11 entrances on all sides. Once the premises are entered one can proceed throughout the entire selling area without any difficulty. Some of the entrepreneurs have space along a wall and

others, in the majority, have establishments more centrally located in that they are substantially surrounded by aisles for public access. A diagram introduced in evidence, although not to true scale, adequately reflects this picture. In fact, the selling floor of the establishment. in utilization of selling space, is not unlike that of a large department store for it contains both wall counters as well as self-enclosed counters more centrally located and approachable by customers from all sides. Apparently, payment is made for purchases at the respective stands.

At least two of the stands, the grocery operated by Long and the other principal grocery stand, known as Standard Groceteria, are self-service groceries and have a common distinguishing feature. They are located on opposite sides of the store, are substantially enclosed by walls or partitions, and entrance is had via turnstiles. Exit is had by the same turnstiles after passing check stands, in the manner prevalent in the modern supermarket. These two operations of Standard and Long, respectively, which are directly involved in the present dispute, lend themselves to complete segregation from the rest of the market when desired, in that they are provided with canvas curtains which can be closed and locked when they are not in operation.

The market is located in downtown San Francisco in an area heavily travelled both by automobiles and pedestrians and it can be entered from a number of streets. One side of the establishment

faces Market Street, a principal artery of the city, and has three entrances. Two of them lead directly into aisles of the store which initially pass between (1) a meat stand and a fruit stand and (2) the aforesaid fruit stand and a liquor and tobacco stand; the last named stand is one of those operated by Long itself. The third entrance leads into an appliance store, a Long operation, from which passage may be had into all other portions of the premises. Although Market Street does not run true east and west,[2] this side of the market may be referred to as the north side.

The adjoining west side of the market faces Eighth Street, also a heavily travelled artery of the city, and has two entrances. One entrance passes between the premises of Standard Groceteria and that of a locksmith and the other passes between the premises of a meat dealer and a tobacco stand operated by Long.

The south side of the market is set back some distance from Mission Street, also a heavily travelled artery. Between the outer wall of the market and Mission Street is located a free parking area for customers of the market. This parking area is owned by Long. There are four entrances to the market from the parking area, one beside a steam beer dispensing establishment, a second between a fish stand and a fruit stand, a third between the aforesaid fruit stand and a liquor stand operated by Long, and the fourth between liquor and tobacco stands operated by Long.

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[2] As reflected on a map of the city.

The remaining side of the market, that facing east, is actually approached by two streets, namely Jessie and Stevenson, which dead end at the side of the market. There is an entrance to the market proper from Jessie Street, this also passing by the steam beer dispensing department. The entrance from Stevenson Street initially passes by a shoe repair stand.

The doors of the market open for business at 8 a.m. and close at 6 p.m. Some departments, including Long's grocery department and Standard Groceteria, open for business at 9 a.m. and other stands, the number undisclosed, apparently open at 8 a.m. Customers use all entrances of the market. Employees of the market who enter after 8 a.m. use any entrance. Those employees who appear for work prior to 8 a.m. are instructed to use one particular door. This is the door on the south side of the market located between a fruit and vegetable concession and the Long liquor department. Long has no direct control over the employees of any of the entrepreneurs save of course those employees working for the four Long operations. The main aisles of the store are approximately 8 to 10 feet wide. Other aisles appear to be slightly narrower, but their precise width is not disclosed.

C. Bargaining history and 1955 negotiations.

The present dispute arises from the 1955 negotiations between Local 648 and various grocers in the San Francisco area, both members and nonmembers of Grocers Association. These negotiations for a new contract did not initially result in an

accord among the interested parties. This affected the two principal groceries in Crystal Palace Market, Long's and Standard Groceteria plus a handful of other stands in the market which were operating within the jurisdiction of Local 648. All other stands in the market were not involved in the dispute.

As stated, Local 648 has bargained since 1937 with Grocers Association and has entered into association-wide contracts. These contracts also covered nonassociation members who had furnished Grocers Association with powers of attorney. The last agreement between the parties, prior to the instant dispute, was for a 5-year term expiring January 1, 1955.

In the latter part of October 1955, Local 648 and Grocers Association corresponded relative to a new agreement. A number of meetings were held commencing on November 10, 1954. The negotiators included Secretary Francis Tissier of Retail Grocers and a number of representatives of Local 648, including its secretary, Claude Jinkerson. Proposals were exchanged and a total of approximately 13 meetings were held. The last meeting, held on January 20, 1955, was also attended by representatives of the San Francisco Labor Council, but no agreement resulted. More direct action was thereafter undertaken by Local 648 against members of Grocers Association, as described below.

The charging party herein, Fruit Association, is a trade organization, similar to Grocers Association, which, since 1937, has been bargaining in be-

half of its members with Local 1017, a sister local of Local 648. Its members included a number of fruit stands in Crystal Palace Market, totaling approximately five in number. It is thus apparent that the great majority of the approximately 64 stands in the Market had no labor dispute of any nature at the time material herein.

In fact, there was no dispute between Fruit Association and Local 1017 because their most recent contract, entered into March 23, 1954, did not expire until April 1, 1955, a date subsequent to the period material herein. This agreement contained a provision forbidding all strikes and lockouts. Although the agreement also contained provisions calling for a greater degree of union security or preference than is permitted under the Act, and there is evidence that the agreement was so applied, the General Counsel expressly does not attack these provisions herein.

The remaining stands at the market, constituting the large majority thereof, bargain with various labor organizations, and, so far as the record indicates, were enjoying labor peace. Indeed, one or more of the other stand operators are members of another trade association which is under contract with Local 648. In sum, Local 648 had a dispute with the two main grocery stands in the market, as reflected by their picket signs described below, and also was interested in signing up a handful of allied operators within their jurisdiction. The remainder of the approximately 64 stands, including the fruit stands coming within the jurisdiction of

Local 1017, had no labor strife. In fact, if the signs carried by the pickets during the picketing commencing February 15, as described below, are to be taken at face value, the picketing by Local 648 was directed only at Long's grocery stand and Standard Groceteria.

On the morning of February 3, 1955, two markets located elsewhere in the city, and represented by Grocers Association, were picketed by Local 648. Grocers Association immediately announced that a strike against one of its members was a strike against all, a position which it had adopted during the contract negotiations, and instructed its members that day to lay off their employees. A number of the employers did so that evening. Among them was Long's grocery and Standard Groceteria which not only laid off their employees that evening but also closed down operations entirely. The curtains around their respective grocery stands were drawn and locked. Although both stands did not reopen for business until February 24, picketing of Crystal Palace Market commenced on the morning of February 15. In the interim, the picketing had spread to a total of 13 or 14 markets located throughout the city. It appears that the picketing at Crystal Palace Market came to an end on or about February 24. A new industry-wide agreement between Grocers Association and Local 648 was reached on March 18, 1955.

Material facts leading to the picketing of Crystal Palace Market are as follows. On February 3, as indicated, the two principal grocery stands at the

market, namely Long's and Standard Groceteria, closed down and laid off their employees. On the morning of Saturday, February 12, Eric Lyons, one of three business representatives employed by Local 648 under the supervision of Secretary Jinkerson, visited Crystal Palace Market for the purpose of signing up several employers. He spoke separately to a number of stand operators; he estimated the number as eight but named only six. Of the six, three signed contracts forthwith and three did not. Not included in this group were Long's or Standard who, as stated, had been closed since February 3.

One of the three nonsigners suggested that all stand operators similarly situated meet with Lyons. A meeting was arranged for 11 a.m. and was attended by Lyons, General Manager Green of Long's, and approximately six stand operators. The latter group included both operators who had as well as some who had not authorized Grocers Association to bargain for them.

Lyons explained the economic gains sought by Local 648. He was asked for assurance that there would be no picketing if the stand operators signed the agreement. He replied that he was unable to give this assurance. He gave the stand operators a deadline of 6 p.m. on Sunday, February 13, to sign up. At least three of the employers present, Italian Importing Company, S & G Delicatessen and Kessler's Market, did not sign. At least one of them, Italian Importing Company, had designated Grocers Association as its bargaining agent.

That evening employees of two of these three operations were laid off and the third stand transferred its employee to another business operation.

That afternoon, February 12, General Manager and Vice President Haag of Long's was asked to meet with a group of the stand operators. A meeting was promptly arranged and held at 1 p.m. with substantially the same group present as had met several hours earlier with Lyons. The stand operators informed Haag of the 6 p.m. deadline on February 13 that Lyons had given them to sign up. Haag replied that this was an individual determination for them to make. He did tell them, however, that if they refused to sign with Local 648, he would not permit them to open on February 14 because he wished to avoid picketing. He stressed the fact that Long's Grocery and Standard Groceteria had closed down, as had one of the delicatessens, Ostrow's, and that if the others closed down there would be no basis for a picket line, as he viewed the situation.

The stand operators agreed to consider the matter and on February 14 and 15 the nonsigners among them remained closed, although on February 15 some of them worked without employees. The record does not disclose the extent to which, if any, these stands operated during the picketing that followed thereafter. This laid the scene for the crucial meeting of February 14, 1955.

On February 14, General Manager and Vice President Haag of Long's was telephoned by Secretary Jinkerson of Local 648. The latter asked

to meet with him that day and a meeting was arranged for 1 p.m. Present at the meeting in addition to Haag and Jinkerson were General Manager Green of Long's, Business Agent Lyons of Local 648, Secretary-Treasurer Allen Brodke of Local 1017, and several representatives of other labor organizations, presumably those representing other employees of the market.

Jinkerson asked Haag to sign the contract proffered by Local 648 and asked why other stands in the market, such as creameries and delicatessens, did not sign. He claimed that a majority of the stores within the jurisdiction of Local 648 had signed up. Haag turned to Green, the latter being in charge of Long's retail operations, and asked if he was willing to sign the contract. Green refused, stating that he chose to abide by the stand taken by Grocers Association.

Haag pointed out to Jinkerson that there was no need to picket Crystal Palace Market because all stands involved in the dispute with Local 648 had closed down. According to Haag, and I so find, he told Jinkerson that he had his "full permission, if he so desired, to picket, to bring his pickets inside the market and picket each of the individual stands. * * *" Green testified similarly, and I find, that Haag stated it was unfair for Local 648 to picket the market because the stands involved had closed down, but that if Jinkerson thought it necessary Haag was inviting him to bring his pickets within the market and picket those stands that were involved in the trade dispute.

Jinkerson replied that this proposed technique would not give Local 648 the necessary economic pressure and rejected it. In a telephone conversation with Jinkerson later that day, Haag asked for 24 hours' notice of any picketing by Local 648 so that other departments in the market, not involved in the dispute, could dispose of perishable goods. Jinkerson declined and the meeting ended.[3]

On the morning of February 15, 1955, pickets sent by Local 648 appeared at 7 of the 11 entrances to the Crystal Palace Market. They first appeared

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[3] The foregoing findings are based upon the credited testimony of Haag and Green which was in substantial agreement. Both were clear and concise witnesses who impressed me as honest witnesses. The version of Jinkerson did agree in some respects with that of Haag and Green. He then proceeded, however, to give the conversation a different flavor. According to Jinkerson, Haag referred to a similar offer he had made during a dispute some years earlier with Local 1017 to a group of union negotiators including Jinkerson and Brodke. Jinkerson stated that on the prior occasion Haag had made the offer to permit picketing inside the market at the stands directly involved and that it was then refused. Haag admitted that he had made this identical offer on the prior occasion but both he and Green maintained that it was made on February 14, 1955. The record is silent as to whether or not Green, who has been in his present position for 2 years, attended the earlier meeting or was even in Long's employ at that time. Green's testimony makes reference only to an offer on February 14, 1955. I am not impressed by Jinkerson's testimony that Haag, on the instant occasion, was only "laying the groundwork" to make the offer again; that Haag did refer to the topic; but that he, Jinkerson, did not "think" that Haag actually made the offer. Neither Brodke nor Lyons was questioned

at approximately 6:30 a.m., although several may have been present as early as 5:30, and by 8 a.m. there were 25 to 30 pickets parading before the two entrances on Market Street which bracket one of the fruit stands. There were two or three pickets at each of the other five entrances. The only entrances not picketed were the four in the rear of the market which face the free parking area. Picketing of those entrances would have required the pickets to parade on private property and this was at no time attempted.

Pickets also appeared at the entrances to the truck lane on Eighth Street, located between the building and the parking area, this being the means of access for incoming trucks. In addition, on the first morning, they physically blocked the principal entrance to the free parking area, also facing Eighth Street. This mass picketing at the parking lot area was abandoned by noon of the first day and was not repeated, according to the credited testimony of Vice President Haag.

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about the conversation. I am unable to accept Jinkerson's version where inconsistent with that of Green and Haag and believe his recollection to be at fault. Not only, as indicated, did Haag and Green impress me favorably as witnesses, but, in addition, their testimony is the more logical under the circumstances. If Haag had made the offer previously and it had been rejected, there was no basis for him to withhold the actual offer on this occasion and to have laid only the "groundwork." Such an offer was consistent with his expressed desire to avoid picketing of the market and stood to benefit Haag's employer. Hence, Jinkerson's testimony in this respect is not accepted.

On the first day of the picketing, Business Agent Lyons of Local 648 carried a banner in the picket line which at all times was peaceful, so far as this record indicates. Picketing was carried on under the supervision of 12 picket captains, who in turn were responsible to the three business agents including Lyons, all under the supervision of Secretary Jinkerson. The participation of representatives of Local 1017 in this activity is discussed hereinafter in a separate section.

Special signs had been ordered by Local 648 for the occasion. They were delivered to the pickets at approximately 8 a.m., on February 15. At least some of the pickets, it may be noted, also wore sashes designating them as AFL pickets. The signs referred only to two of the grocery concerns in the market, namely Long's grocery and Standard Groceteria. Their content is as follows:

Standard Grocery
Unfair
Grocery Clerks Union A.F.L.
Sponsored by S. F. Labor Council

J. M. Long Co.
Unfair
Grocery Clerks Union A.F.L.
Sponsored by S. F. Labor Council

One other sign merits discussion. It was carried prior to 8 a.m. on February 15, as well as thereafter, and had been personally prepared by Jinkerson on the previous evening. It was left over from a picketing episode elsewhere. This sign, according to Jinkerson, originally read as follows:

Unfair
Don't Patronize the Grocery Department
Sponsored by S. F. Labor Council
A.F.L. Grocery Clerks Union

Over the second line Jinkerson had pasted sheets of paper on which he printed the words, "J. M. Long & Co.", the result being that this sign was substantially similar to the other signs which appeared on the scene at 8 a.m. on February 15. This sign, in its corrected form, together with the others, was carried during the picketing at all entrances to the market save those in the rear which, as described, are located on private property. Stated otherwise, 7 of the 11 market entrances located on three sides of the property and used by employees and customers alike were picketed from the morning of February 15 until approximately February 24.

One more aspect of the picketing may be of interest. The picketing met with the displeasure of one Rose Misuraca, who operated a fruit and produce stand in the market within the jurisdiction of Local 1017. She became concerned over the fact that the picketing would affect her stand, despite the fact that she and the other fruit dealers in the market were not involved in any labor dispute. She prepared a sign reading as follows:

I'm Not Unfair to Anyone. I have 4 Kids. The Union Won't Feed Them. Fruits and Veg. Are Not on Strike. Dept. 54.

She personally donned the sign and picketed outside the Market Street entrances, in effect picket-

ing the pickets from 10 until 12 noon on February 15. She did not picket again. Misuraca claimed that during this period while she was picketing, one of the signs, presumably that prepared by Jinkerson, did not bear the superimposed paper prepared by Jinkerson, this resulting in the sign referring not to J. M. Long & Co. but rather to "the Grocery Dept." as unfair. However, pictures introduced as exhibits by Respondents demonstrate that the sign bore the superimposed language described by Jinkerson at the time Misuraca placed the uncorrected sign on the scene. I have concluded, therefore, that Misuraca, who was in an emotional state at the time because of her fear of impending monetary loss and was busy picketing on a heavy traveled sidewalk, was in error as to the content of the sign. And, in any event, assuming that she was correct in her observation, this was an isolated happening which was quickly remedied pursuant to plan by Respondents.

D. Conclusions with respect to Local 648.

For the purposes of this discussion I shall assume that the signs bearing the Long Company name identified Long in its capacity as a grocery stand operator only and not as the operator of the market. At least the General Counsel does not contend otherwise. It is found, therefore, that the signs made reference only to the two employers with whom Local 648 had a primary dispute.

In sum, Local 648 had unsuccessfully attempted to negotiate a contract with the Long Company and Standard Groceteria in their respective capacities

as grocery stand operators in the Crystal Palace Market. These negotiations had taken place as part of association-wide negotiations between Grocers Association and Local 648 and, commencing on February 3, 1955, Local 648 had picketed various members of that organization. As a result, some of the members of Grocers Association, as well as nonmembers for whom it bargained, had closed down operations. This group included J. M. Long and Company and Standard Groceteria which had closed down completely on February 3. A last minute attempt by Local 648 to sign up the Long Company on February 14 was rejected by the latter which chose to abide by the position of the Grocers Association that the union demands should be resisted.

On February 14, Vice President Haag of the Long Company did invite Local 648 to bring its pickets inside the market and picket the stands directly involved in the dispute. This offer was rejected by Secretary Jinkerson who stated that this technique would not allow Local 648 the necessary economic pressure. As a result, 7 of the 11 entrances to the Crystal Palace Market, all located on public thoroughfares on three sides of the market, were picketed from February 15 until on or about February 24.

While the dispute centered primarily about conditions involving the two grocery stands, Local 648 was also interested in signing up several other stands in the market. In fact, Business Agent Lyons, on February 14, had raised with Haag the

point that several other stands in the market had failed to sign up. It was after this that Haag had extended the invitation to picket within the market. I find, therefore, that the invitation applied not only to the stands operated by the Long Company and Standard Groceteria, which were closed down, but also to the others, apparently three in number. Nevertheless, the signs carried by the pickets from February 15 on identified only the Long Company and Standard Groceteria as the grocery stands being picketed by Local 648. And these two stands, as found, had shut down operations and remained closed for the duration of the picketing. Thus, with the possible exception of approximately three other stands, none of the approximately 59 remaining stands in the market were involved in this dispute.

It is readily apparent that this case falls within the group known as "common situs" cases. One qualification is in order because here, the common situs is a permanent and fixed one while the usual cases treating the problem are ones where the common situs happens to be a temporary one. See, e. g., Moore Drydock Co. 92 NLRB 547.

Perhaps a logical starting point in an evaluation of this problem is found in the language of the Supreme Court in N. L. R. B. v. Denver Building and Construction Trades Council, 341 U. S. 675, where the Court pointed out that in such cases there were "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending em-

ployers and others from pressures in controversies not their own. * * *"

Stated otherwise, was the interest of Local 648 in publicizing the dispute with a very small minority of the employers in the common situs outweighed by the interests of other proprietors and the community at large in remaining free from controversies not their own? See International Brotherhood of Teamsters v. Hanke, 339 U. S. 470, where the Court upheld a determination by the Supreme Court of Washington which answered this question in the affirmative. Does Board policy require a similar result here?

Current Board thinking on the matter stems from the Moore Drydock Co. case, supra. In that case the respondent union had a dispute with a shipping company relative to recognition of that union as the representative of certain shipboard employees. The ship was placed temporarily in drydock for various alterations. Thus, the secondary employer, the drydock operator, harbored the situs of the dispute between the respondent union and the primary employer.

In treating with the issue whether such picketing was primary or secondary, the Board laid down four conditions which, if met, would warrant a finding that the picketing was primary and therefore protected. These are:

(a) The picketing was limited strictly to times when the situs of the dispute was on the secondary employer's premises.

(b) At the time of the picketing the primary em-

ployer was engaged in its normal business at the situs.

(c) The picketing was limited to places reasonably close to the situs of the dispute.

(d) The picketing clearly disclosed that the dispute is with the primary employer.

The reliance by the General Counsel in the present case on an alleged failure to meet the second requirement specified above is treated below. In the Moore Drydock Company case, a Board majority found that all four requisites were met and accordingly dismissed the 8 (b) (4) (A) allegations of the complaint. It is interesting to note that the minority [4] argued that the picketing was not protected because the primary employer, the shipping company, was not engaged in its normal business at the situs, namely the drydock, and that as a result a violation should be found.

In fact, the General Counsel stresses this aspect of the present case, pointing out that Long Company and Standard Groceteria, the only concerns identified by picket signs as the object of the picketing, were closed down during the picketing. Thus, his claim would appear to be that there was an even greater failure to meet the second requisite of the Moore decision than that adverted to by the Moore minority for, in the present case, the primary employers involved were shut down, whereas in the Moore Drydock decision they were carrying on certain operations.

Before leaving the Moore decision, note must be

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[4] Members Reynolds and Murdock.

taken of the fact that the majority, in treating with the third element, namely the requirement that the picketing be conducted at places reasonably close to the situs, pointed out that the respondent union had sought and had been denied permission to place pickets at the particular dock where the ship was tied up and, as a result, had posted pickets at the entrance to the shipyard. This, too, is relevant to the present case where Local 648 had been offered the opportunity to picket at the individual stands involved in the dispute and had refused. Indeed, this opportunity for inside picketing, it is interesting to note, was one that they could not claim of right. See Marshall Field & Co. v. N. L. R. B., 200 F. 2d 376 (C. A. 7).

An application of the Moore Drydock formula on facts similar to those present in the instant case is found in International Brotherhood of Boilermakers, Lodge No. 92, et al. (Richfield Oil Corporation), 95 NLRB 1191. There, as in the present case, the signs were carefully tailored to the dispute and identified only the primary employer involved. However, the Board pointed out that this was not "the deliberate attempt to confine the force of the picketing to the primary employer found by the Board in the Moore Drydock case. There the picketing union, before it established its picket line, asked permission of the secondary employer to place the line inside the premises right at the situs of the dispute, so that there would be no disruption to business between secondary employers. Here no such request was made to Richfield. * * *" The

Board went on to find the picketing violative of Section 8 (b) (4) (A) of the Act on the basis that, in part at least, the picketing sought to bring about a cessation of business between the primary and secondary employers involved. See also Plumbers & Pipefitters, et al. (Columbia-Southern Chemical Corp.), 110 NLRB No. 25, where the Board stated, "Apart from any other considerations, it suffices to establish a violation of Section 8 (b) (4) (A) that, so far as the record shows, respondent * * * made no effort to obtain permission from (the neutral employer) to picket inside the construction area at the actual situs of the primary dispute. * * *" Significantly, in the present case, in a not dissimilar context, such permission was readily offered but was promptly rejected.

In Stover Steel Service v. N. L. R. B., 35 LRRM 2545, 2547, the Court of Appeals for the Fourth Circuit treated with the problem of picketing by the respondent unions of construction projects of open shop contractors who employed union subcontractors. The court there stated,

> It is no answer to this to say that the campaign was an organizational campaign and that the picket signs so indicated. The picketing was done at premises where business of the subcontractors as well as business of the contractors was being carried on; and everyone knew that it would affect, not the nonunion employees of the general contractors, but the union employees of the subcontractors, and it is idle to suggest that it was not engaged in for this

purpose. As the object was to bring pressure on the general contractors by the pressure exerted on the subcontractors, through concerted action of their employees, we think that the conduct complained of is clearly an unfair labor practice within the meaning of Section 8 (b) (4) (A) of the Labor Management Relations Act * * *

The Court then set aside and remanded a Board Order dismissing a complaint which had alleged the picketing to be violative of Section 8 (b) (4) (A) of the Act. This has since been adopted by the Board as the law of the case. Baltimore Building and Construction Trades Council (Stover Steel Service), Supplemental Decision, 112 NLRB No. 36. The foregoing rationale only serves to bring to the fore again the fact that the employees of the two primary employers involved, Long Grocery Company and Standard Groceteria, were not working at the time of the dispute due to the shutdown.

Another of Respondents' contentions may be treated at this point. Respondents claim that J. M. Long and Company, in its capacity as the owner of Crystal Palace Market, is directly interested in the businesses of every tenant of the market, and that as a result, there are no neutral or independent employers in the market because all are operating their respective businesses for the benefit of Long. Respondents stress the claim that the Long Company in its capacity as market operator could tell tenants when to close or open; derived revenue from a percentage of the tenants' receipts;

and handled advertising for the entire market. They rely on the fact that Vice President Haag, on February 12 informed several of the grocery stand operators that he would not permit them to remain open during the picketing if they did not sign with Local 648, this being done in his attempt to remove a cause for picketing as he viewed it.

Nevertheless, Board and court precedent in analogous cases is to the contrary. The respective stands hire their own employees, pay their own employees, and have complete autonomy in dealing with their employees concerning conditions of employment. They use their own funds and purchase and sell their own merchandise. Any interest of the market operator, Long, in the method of doing business by the stand operators, is not sufficient to alter the status of the latter as independent businessmen. Nor is this sufficient to render these other concerns, other than grocery stand operators, allies of the grocery stands or of Long, and therefore not neutral employers. There is no evidence of control by the Long Company in its capacity as market operator over the methods by which the respective stands sell their merchandise and, moreover, this is not a situation of struck work being transferred to other stands in the market.

Nor does the fact that the Long Company also operated several other stands in the market assist Respondents here. These other operations were not involved in any labor dispute with any labor organization, let alone Local 648, and any picketing directed at the employees of these operations en-

gaged in their normal business, is on the same plane as picketing directed at the employees of other non-grocery stands. The fact is that the employees of these other stands are not employees of the Long Company and that these other stands were not, on this record, allies of Long or non-neutrals in the particular labor dispute which gave rise to the picketing. Accordingly, this contention of Respondents is rejected. N. L. R. B. v. Denver Building and Construction Trades Council, 341 U. S. 75; Denver Building and Construction Trades Council, 108 NLRB 318, enf'd 35 LRRM 2505 (C. A. 10); Hoosier Petroleum Co., Inc., 106 NLRB 629, enf'd 212 F. 2d 216 (C. A. 7); N. L. R. B. v. Norma Mining Corp., 206 F. 2d 38 (C. A. 4); and N. L. R. B. v. Steinberg, 182 F. 2d 850 (C. A. 5).

I find, therefore, that J. M. Long and Company, in its capacity as operator of the Crystal Palace Market, was not the employer of any of the employees working for the various stands in the market, other than those it operated itself. I further find that the non-grocery stands in the market are not allies of J. M. Long and Company in its capacity as operator of the market, and that they are neutral employers entitled to the protection of 8 (b) (4) (A) of the Act.

In summation, J. M. Long and Company had a dual role in the Crystal Palace Market. It owned the market and, as landlord, rented space to tenants who operated approximately 60 stands. Long also operated four stands on the same basis as the tenants, in effect renting from itself. But the rec-

ord demonstrates that Local 648 took up with Vice President Haag the problem of the grocery stand operators, other than Long and Standard Groceteria, that had not signed up with Local 648.

Pertinent to the instant problem is the fact that the grocery stands involved in the dispute were not located near the majority of the picketed entrances. This is particularly true of the Market Street entrance where the majority of the pickets were stationed and where a picket line was maintained.

Of course, had permission for inside picketing been refused, a different problem would have been posed, one which need not be treated with herein. The fact is, however, that Local 648 was given the opportunity to picket at the immediate situs of the dispute, refused, and chose to picket only at locations where the employees of other employers would be affected. Moreover, the record demonstrates that, to some extent at least, the picket line was respected by other employees within the market.

Nor is it an answer to say that the pickets were interested only in influencing the public. Employees of the other tenants used all entrances to the market. There is no evidence that Local 648 attempted to influence the public in any manner other than by picketing. Presumably, the public interested in patronizing the grocery stands directly involved in the dispute would be equally responsive to picket signs placed at the respective stands or to media other than picketing to publicize the dispute. This is not to say that other media should have been used by Respondents. However, the use of only a

medium with secondary complications is indicative of purpose.

In fact, the stands involved in the dispute were closed at the time of the picketing. While it could be claimed that the picketing was intended to influence the public against future patronage of the closed grocery stands, namely Long's and Standard Groceteria, it would appear far more likely, and I find, that the picketing was intended to bring pressure to bear, as one of its objectives, on the other stands in the market and on their employees.

The General Counsel has contended that the second item of the Moore Drydock formula requiring the primary employer (the Long and Standard Groceteria stands) to be engaged in its normal business at the situs, has not been met because the stands were closed and, as a result, a violation of Section 8 (b) (4) (A) of the Act has been spelled out. I deem it unnecessary to pass upon this contention as such, although the facts are a portion of the factual picture from which conclusions may properly be drawn as to the objective of the picketing. Hence, I deem it unnecessary to determine whether by the term "normal business," as used by the Board in the Moore Drydock decision, the Board included a business temporarily closed down but one which was likely to reopen upon conclusion of the labor dispute.

The most that can be said for Respondents' position is that Local 648 made an ostensible effort to stay within the letter of the law as formulated by the Board in the Moore Drydock case. There was

a primary labor dispute in the present case, the signs were carefully tailored to the dispute, and picketing was peaceful.

But there was a failure to comply with another standard defined in that decision dealing with the common situs problem. Because, notwithstanding the outward aim of this action directed to 2 grocery stands of 64 stands in the market, Respondents were manifestly interested in hitting the neutral employers. In view of the fact that the two grocery stands directly involved in this dispute were closed down, the fact that no other media were utilized, and the fact that Local 648 refused to picket in the immediate vicinity of the dispute, thus directly and inevitably affecting the employees of neutral employers, there is little doubt as to the real intentions of Local 648.

While it is obvious that picketing inside the market at the respective locations of the two grocery stands is not as effective as picketing outside the market, this is no answer. The Act does not guarantee effective picketing. The answer is rather that Congress, with a purpose of confining the area of economic conflict in labor disputes to direct disputants, intended Section 8 (b) (4) (A) to condemn all action directed against or which has the effect of injuring the business of third persons not involved in the basic labor dispute.

The operator of the Crystal Palace Market, consonant with such policy, attempted to localize the dispute by offering to permit picketing inside the market, but this offer was rejected by Local 648.

After an inspection of pictures of the interior of the market, I am unable to find that picketing inside the market would be neither effective nor reasonable and would create confusion in the aisles. This would appear rather to be a policy matter for the operator of the market and the latter has offered to assume that risk. Indeed, the turnstiles are the only entrances to the two grocery stands and establish a focal point for picketing. Accordingly, Respondents' contention to the contrary is not adopted.

I find, therefore, as contended by the General Counsel, that Local 648 picketed 7 of the 11 entrances to Crystal Palace Market with the object, in part at least, of bringing pressure to bear upon the other stands in the market in order to force them to cease doing business with J. M. Long and Company in its capacity as owner of the market. I further find, contrary to the contention of Local 648, that the illegal objective requirements of Section 8 (b) (4) (A) have been sufficiently established herein.

E. The case against Local 1017.

The record is replete with evidence demonstrating that Local 1017 ratified and actively supported the strike of its sister local, Local 648, all of which need not be set forth. Local 1017, it will be recalled, was signatory to a contract with Fruit Association which included a small number of fruit and produce stands in Crystal Palace Market, approximately five in number. This contract did not expire until April 1, 1955, and contained a broad no-strike

clause. Nevertheless, despite such clause, Local 1017 actively supported the strike, thereby breaching its contract with Fruit Association, although that issue is not before me.

(1) Secretary-Treasurer Allen Brodke of Local 1017 attended the February 14 meeting of Local 648 with Vice President Haag of Crystal Palace Market and was aware that the latter had offered Local 648 the opportunity to picket inside the market directly at the stands involved in the trade dispute.

(2) On February 14, counsel for Fruit Association wrote to Brodke and asked that Local 1017 follow a policy of non-intervention in the grocery dispute and live up to their contract. Brodke did not reply to this letter and the conduct thereafter of Brodke and his assistant demonstrates that they adopted a different course of action.

(3) Brodke does not normally in the course of his duties visit the Crystal Palace Market. However, during the picketing, he was present every day, the first day for 6 to 7 hours, the second for 2 to 3 hours, and for undisclosed periods on succeeding days. His appearances were primarily in the vicinity of the main picket line on Market Street. He testified that he was present on February 14 because he wanted to see what was going on at the market.

(4) Although Brodke claimed that he was present at the market solely as an observer, he physically picketed for 2 or 3 minutes on the first day.

He testified that he held a conversation with one of the pickets on this occasion.

(5) Although Brodke held conversations with his members who, as he put it, were observing the picket line at Crystal Palace Market, these conversations being held in the vicinity of such picket line, the record is devoid of any evidence that Brodke informed the membership of Local 1017 that by observing the line they might be placing their union in the position of breaching a labor contract. To the contrary, he testified that members of his union would approach him, this too in the vicinity of the picket line at Crystal Palace Market, and say "Hello, Al, what's doing?" To this, Brodke invariably replied, "Well, pretty good picket line around here." [5]

(6) On the first day of strike activity, February 3, Brodke assigned one of his business agents, Pat Savin, to Local 648. He testified that Savin was recuperating from an operation and that he instructed him to report to Local 648 because "they might need a little manpower. The business agents will be out signing agreements. Maybe they can use you."

Secretary Jinkerson testified that Savin assisted his labor organization during the strike as one of a group of outside union representatives who came in to the area to assist the business agents of Local

[5] Nor is his presence explainable on the theory that he was attempting to find other employment opportunities for his members. For, not until February 21 did Brodke take steps in such a direction.

648 in obtaining signed contracts. The record demonstrates that Savin went beyond this, however. Savin, from time to time, although he allegedly had no business at Crystal Palace Market, would drive by. On occasions he would get out of his car and visit the area. The record demonstrates, as will appear below, that Savin took steps to actively support the picket line.

(7) Savin testified that both prior to and during the picketing he never gave any instructions to his members concerning working in the market. There is evidence to the contrary. Thus, one Preciado, an employee of a fruit stand in the market and a Local 1017 member, asked Savin for permission to go through the line to work. Savin replied, as he testified, "I issue nobody any orders to go through the picket line; if he wanted to go through the picket line, it was up to him and I couldn't stop him; if he needed aid to come up to the Union and we would take care of him."

It is obvious that this statement by Savin, as well as the statement invariably made by Brodke to the pickets, set forth above, is hardly the answer of a union representative attempting to live up to a no-strike clause of an existing contract. See Joliet Contractors, 99 NLRB 1391, 1395, enf'd 202 F. 2d 606 (C. A. 7), and Richfield Oil Corporation, 95 NLRB 1191, 1193. In the latter case the Board characterized similar statements as "evasive replies suggestive of a negative response."

(8) There are a number of instances of conduct on the part of representatives of Local 1017 which

are explainable only on the basis that Local 1017 was officially supporting the strike of its sister local, Local 648. Thus, on the evening before the strike, Savin spoke to Donald Donabedian, the operator of a fruit and produce stand in the market, and informed him that if there was a strike, as Donabedian testified, "the boys wouldn't be able to come to work." This statement, again in the face of a no-strike clause in the contract, amounts not to a comment about what individual members might do but rather to a statement of an official union position. I so find.

(9) On the first day of the picketing, one Hagopian, an employee of Rose Misuraca at her fruit and produce stand in Crystal Palace Market, did not appear for work. Later that day, Misuraca noticed Hagopian working for one Gummow, the operator of two fruit and produce stands in the market. She spoke to Business Agent Savin and asked him for an explanation. Savin promptly entered the market and spoke to Hagopian. There is a conflict as to whether Savin merely asked Hagopian what he was doing in the market or whether he expressed himself more forcefully to the effect that Hagopian would never work again in San Francisco as a fruit man. I deem it unnecessary to resolve this conflict, in this aspect of the case, because either version is consistent with Savin's testimony that Hagopian, as a permit man, was allowed only to work for the one concern for which the permit was issued, in this instance the stand operated by Misuraca. It may be noted, how-

ever, that the contract contains no such restriction on permit men and that this restriction stems from union policy. Accordingly, in the conclusions that follow, no reliance is placed upon this occurrence.

(10) Warren Gummow operated two fruit stands in the market and included among his employees one Andrews, a member of Local 1017, and one Higgins, who held a permit from Local 1017 and has since entered military service. According to Gummow, Higgins was a cleanup man, and at 8 a.m. on February 15 had been assigned by Gummow to trim cabbage. Savin passed by and instructed Higgins to drop his knife and leave the market. Soon thereafter, Savin entered the market again, spoke to Andrews, and informed him that he was "not supposed to be here; come on let's go." Both employees duly left the building.

Savin admitted that he asked Andrews what he was doing in the market and presented herein no basis for asking the question, a question which, it is apparent, was in no way related to Savin's claimed assignment to Local 648 for the purpose of signing up grocery operators. Savin denied that he told Higgins to drop his knife and to leave the market. He did not recall seeing Higgins that morning but admitted that he was in the vicinity at that time. He claimed that Higgins' working hours were from 9 to 6, those specified in the contract, and further claimed that Gummow had agreed to employ him only during those hours.

I find, in view of Savin's admission that he spoke to Andrews, that he also spoke to Higgins on this

occasion. I credit Gummow's testimony that Higgins had no set hours. It is apparent that Savin's similar treatment of Andrews and Higgins was an attempt to keep members of Local 1017 from working for fruit and produce stands in the market and not, as his testimony would indicate, an attempt merely to police the union contract. I so find, and in doing so rely upon the marked inconsistency between his conduct on this occasion and his claimed activity in behalf of Local 648 at the same time.

(11) As set forth, picketing of the Crystal Palace Market commenced on Tuesday, February 15. On the previous Saturday, Secretary-Treasurer Brodke visited Donald Donabedian at the latter's produce stand, informed him that there might be a grocery strike, and advised him not to stock up with merchandise because "his (Brodke's) members would not be able to cross the picket line." On Monday afternoon, prior to the strike, Business Agent Savin visited Donabedian and spoke to him in the same vein, saying "if there was a strike the boys (members of Local 1017) wouldn't be able to come to work."

About a week before the strike commenced, Savin spoke to the same effect to Rose Misuraca, then operating a fruit stand in Crystal Palace Market. She asked Savin if a grocery strike would affect the fruit and produce stands and Savin replied "if they put a picket, of course we won't cross it." Misuraca protested that this would make things difficult for her, to which Savin replied, "Well,

then, you'd better prepare yourself." Again, on Monday, February 14, Savin passed by Misuraca's stand at closing time and stated loudly as he passed, "If there is a picket out there your boys won't report to work."[6]

(12) Although Donabedian testified at one point the Brodke wore an AFL picket sign on the Eighth Street side of the market, he elsewhere indicated that he might have had in mind another occasion later that week when Brodke picketed Donabedian's truck while it was at the produce market in San Francisco. This arose from another dispute, namely the fact that Donabedian had for one day hired a nonunion member, Rose Misuraca, the latter's stand then being closed. Accordingly, I do not find that Brodke wore a picket designation at the Crystal Palace Market picket lines. And, as indicated, this complaint does not attack the imposition of closed shop conditions by Local 1017. As a result, in the conclusions that follow, no reliance is placed upon this incident, although it is significant, as previously set forth, that Brodke was present at the picket lines prior to this incident.

I find that the foregoing incidents serve to refute the claim that Business Agent Savin was engaged elsewhere during the period of the picketing at Crystal Palace Market. I further find that the statements by Brodke and Savin as set forth above

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[6] The foregoing findings are based upon the credited testimony of Misuraca and Donabedian, which, in this respect, was not controverted or specifically denied.

were not opinions as to what their members might do, but rather were expressions of official union policy. This is not to say that union members may or may not cross the picket lines as they see fit. It is to say that when such conduct is the result of official union policy, it encounters the possibility that it may be violative of the provisions of the Act.

In view of the foregoing circumstances, except as otherwise indicated, I find that Local 1017 ratified and supported the strike of its sister local, Local 648. If the objectives of the latter were forbidden by the Act, it necessarily follows that Local 1017 has also engaged in conduct violative of Section 8 (b) (4) (A) of the Act. I so find. See International Brotherhood of Firemen and Oilers, et al. (Hammermill Paper Company), 100 NLRB 1176, and Service Trade Chauffeurs, et al. (Howland Drygoods Company), 85 NLRB 1037, enf'd in part and remanded in part 191 F. 2d 65 (C. A. 2), and enf'd 199 F. 2d 709 (C. A. 2).

F. The alleged violation of Section 8 (b) (1) (A).

The complaint also alleges that Local 1017, commencing on or about February 15, 1955, threatened employees that they would be black-listed and would never work again in a union shop if they crossed the picket line and reported for work.

The General Counsel, it appears, is relying herein on one incident. This is the occasion when Hagopian, an employee of Rose Misuraca at her fruit stand, worked for one day during the strike for another fruit and produce stand operator, Gummow. The facts surrounding this and the conflict

of testimony have been heretofore set forth. This all reduces itself to whether or not Business Agent Savin of Local 1017 stated, when he saw Hagopian at work for Gummow, that Hagopian would be blackballed from the Union and would never work again in San Francisco as a fruit man. Gummow testified that Savin so spoke, whereas Savin testified that he merely asked Hagopian what he was doing there. Hagopian, a witness of limited comprehension, testified similarly to Savin. It will be recalled that Hagopian, according to Savin, was a permit man and was authorized by Local 1017 to work only for the employer for whom the permit was issued, in this case Misuraca.[7]

Although I am disposed to credit Gummow's version of the conversation, I deem it unnecessary to resolve the conflict.

(1) Assuming that Gummow's version of the conversation were accepted, it is clear that this was an isolated statement. The sole issue is whether the statement if made, constituted a violation of the Act and, if so, whether remedial measures are required in order to effectuate the policies of the Act. The disposition of this issue would be a simple one were it not for cases in which it has been held

[7] Of course the claimed violation would relate solely to the threat that Hagopian would not obtain further work and not to black-listing him from further union membership, for the prohibition in the Act does not apply to a union's threatened action with respect to purely internal union status not involving terms or conditions of employment. Fox Midwest Amusement Corp., 98 NLRB 699, 719.

that statements or incidents occurring in isolation do not constitute a violation of the Act or if so, do not require remedial measures. As stated in language adopted by the Board, "isolated and vagrant coercive statements by an employer's supervisor alone are usually not deemed sufficient to constitute an unfair labor practice." Playwood Plastics Co., Inc., 110 NLRB No. 39. And closer to the present case, the Board has recently held, in the case of an isolated threat to discharge an employee if he went on strike, that "it would not serve any useful purpose to issue a cease and desist order based thereon." P & V Atlas Industrial Center, Inc., 112 NLRB No. 122. Needless to say, the decisional standards in cases against a labor organization are the same as those in cases against employers, both qualitatively and quantitatively.

(2) Moreover, there is no evidence that any action was taken to effectuate this threat if made. To the contrary, Hagopian testified that he is now working for a fruit and produce stand in the Crystal Palace Market. The record does not indicate when he went to work for this concern, the Peninsula Fruit Company, but it is significant that at least until April 1, 1955, the fruit and produce stands in the market were operating under an illegal closed shop contract with Local 1017.

(3) I am of the belief that a decision by the Court of Appeals for the Ninth Circuit is in point. In N. L. R. B. v. Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 127 (A. F. L.), 202 F. 2d 671 (C. A. 9), the Court

refused to enforce a Board order finding a violation of Section 8 (b) (1) (A) under not dissimilar circumstances. As stated by the Court, "Even if this isolated incident did occur, to predicate a cease and desist order upon it is to magnify the inconsequential to the point where the action becomes an abuse of discretion." Accordingly, and in view of the foregoing considerations, I find that it would not effectuate the purposes of the Act to issue a cease and desist order based upon this allegation of the complaint and will recommend its dismissal. Terri-Lee, 107 NLRB 560, and Gillcraft Furniture Co., 103 NLRB 81.

IV. The effect of the unfair labor practices upon commerce.

The activities of Respondents, set forth in Section III above, occurring in connection with the operations set forth in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The remedy.

Having found that Respondents have engaged in conduct violative of Section 8 (b) (4) (A) of the Act, it will be recommended that they cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act. See I. B. E. W. v. N. L. R. B., 341 U. S. 694.

Upon the basis of the foregoing findings of fact,

and upon the entire record in the case, I make the following:

Conclusions of Law

1. Retail Fruit & Vegetable Clerks' Union, Local 1017, and Retail Grocery Clerks' Union, Local 648, Retail Clerks International Association, AFL, are labor organizations within the meaning of Section 2 (5) of the Act.

2. By inducing and encouraging employees of stands, other than grocery stands, that are tenants of Crystal Palace Market, to engage in concerted refusals to perform work for their respective employers, with an object of forcing or requiring their respective employers to cease doing business with J. M. Long and Company, Inc., in the latter's capacity as owner of Crystal Palace Market, Local 648 and Local 1017 have engaged in unfair labor practices within the meaning of Section 8 (b) (4) (A) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, I recommend that Respondents, Retail Fruit & Vegetable Clerks' Union, Local 1017, and Retail Grocery Clerks' Union, Local 648, affiliated with Retail Clerks International Association, AFL, their officers, agents, successors and assigns shall:

1. Cease and desist from inducing and encourag-

ing the employees of tenants of Crystal Palace Market, or the employees of any other employer, to engage in a strike or concerted refusal in the course of their employment to perform services for their employer where an object thereof is to force or require any employer or person to cease doing business with J. M. Long and Company, Inc., in its capacity as owner of the Crystal Palace Market.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Post at their respective business offices copies of the notices attached hereto as Appendices A and B. Copies of said notices, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by a representative of each Respondent, be posted by said Respondent immediately upon receipt thereof and maintained for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to their members are customarily posted. Reasonable steps shall be taken by said Respondents to insure that the notices are not altered, defaced, or covered by any other material.

(b) Mail to the Regional Director for the Twentieth Region signed copies of the notice attached hereto as Appendices A and B for posting at the Crystal Palace Market, J. M. Long and Company, Inc., willing, in places where notices to employees of the tenants of the market are customarily posted.

(c) Notify the Regional Director for the Twen-

tieth Region in writing within twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order what steps they have taken to comply herewith.

It is recommended that unless Respondents shall, within twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order, notify the aforesaid Regional Director in writing that they will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring them to take the action aforesaid.

It is further recommended that the complaint be dismissed insofar as it alleges that Local 1017 has engaged in conduct violative of Section 8 (b) (1) (A) of the Act.

Dated this 19th day of July, 1955.

/s/ MARTIN S. BENNETT,
Trial Examiner

Appendix A. Notice to All Members of Retail Fruit & Vegetable Clerks' Union, Local 1017, Retail Clerks International Association, AFL. Pursuant to the recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

We will not induce or encourage the employees of any tenant of Crystal Palace Market, or of any other employer, to engage in a strike or concerted refusal in the course of their employment to per-

form services for their employer where an object thereof is to force or require any employer or person to cease doing business with J. M. Long and Company, Inc., in its capacity as owner of Crystal Palace Market.

Retail Fruit & Vegetable Clerks' Union, Local 1017, Retail Clerks International Association, AFL
(Labor Organization)

Dated.....

By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Appendix B. Notice to all Members of Retail Grocery Clerks' Union, Local 648, Retail Clerks International Association, AFL. Pursuant to the recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

We will not induce or encourage the employees of any tenant of Crystal Palace Market, or of any other employer, to engage in a strike or concerted refusal in the course of their employment to perform services for their employer where an object thereof is to force or require any employer or person to cease doing business with J. M. Long and

Company, Inc., in its capacity as owner of Crystal Palace Market.

Retail Grocery Clerks' Union, Local 648, Retail Clerks International Association, AFL
(Labor Organization)

Dated.....

By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of Board and Cause.]

RESPONDENTS' EXCEPTIONS TO TRIAL EXAMINER'S INTERMEDIATE REPORT AND RECOMMENDED ORDER

I.

The findings and conclusions of the Trial Examiner, set forth in his intermediate report in the above matter, are not supported by substantial evidence on the record considered as a whole.

II.

The Trial Examiner's report substitutes inferences drawn solely from his own judgment as to the lawfulness and propriety of the means used by respondents in a primary labor dispute for the sole statutory test, to-wit, the unlawfulness of the end or objective sought.

III.

The report of the Trial Examiner misapplies the

law to the facts as found in the record as a whole and fails to follow Board and judicial precedent and decision with respect to common situs picketing and boycotts.

IV.

The recommended order violates respondents' rights to strike and peacefully publicize a primary labor dispute at the premises of the primary employer, which rights are guaranteed by the Constitution of the United States and confirmed by Section 13 of the Act. As such, the recommended order of the Trial Examiner is beyond the authority of the Board to adopt.

V.

The recommended order, if adopted, would establish the novel theory, unsupported in the law, that a labor organization may picket and advertise a primary labor dispute on public sidewalks and thoroughfares adjacent to the public entrances to the permanent common business situs of several employers only when the labor organization has been refused permission to picket inside the premises on private property in an area where some of the primary employers' employees perform their jobs.

San Francisco, California, August 22, 1955.

Respectfully submitted,

CARROLL, DAVIS & BURDICK,

/s/ By ROLAND C. DAVIS,

Attorneys for Respondents Retail Fruit & Vegetable Clerks' Union, Local 1017, and Retail Grocery Clerks' Union, Local 648, Retail Clerks International Association, A. F. L.

United States of America
Before the National Labor Relations Board

Case No. 20-CC-106

RETAIL FRUIT & VEGETABLE CLERKS' UNION, LOCAL 1017, and RETAIL GROCERY CLERKS' UNION, LOCAL 648, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO [1] and RETAIL FRUIT DEALERS' ASSOCIATION OF SAN FRANCISCO, INC.

DECISION AND ORDER

On July 19, 1955, Trial Examiner Martin S. Bennett issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondents filed exceptions to the Intermediate Report and a supporting brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in this case, and hereby adopts the

[1] The AFL and CIO having merged, the Respondents' affiliation is amended accordingly.

findings, conclusions, and recommendations of the Trial Examiner to the extent consistent herewith.

As more fully set forth in the Intermediate Report, the Crystal Palace Market is a large, one-story building covering approximately 4 acres and containing about 64 retail stands or shops. J. M. Long and Company, Inc., herein called Long, owns the market but actually operates only 4 of the 64 stands or shops; the others are operated by entrepeneurs who lease their respective premises from Long on a monthly basis under leases which either party may cancel on 30-day notice and which provide for a rental based upon a percentage of receipts coupled with a minimum monthly rate. Haag is Long's general manager in charge of the entire premises and Green is Long's manager in charge of retail operations. Grocers Association has bargained with Local 648 and has entered into association-wide contracts; these contracts have also covered nonassociation members who had furnished Grocers Association with powers of attorney. Fruit Association, the charging party, is a trade organization similar to Grocers Association which has bargained on behalf of its members with Local 1017, a sister local of Local 648; its members include approximately five fruit stand operations in Crystal Palace Market.

There was no dispute between Fruit Association and Local 1017 as its most recent contract did not expire until after the events material herein had already occurred. The remaining stands at the market bargain with various other labor organizations

and were wholly unaffected by any labor dispute. The present dispute had its genesis in the 1955 negotiations between Grocers Association and Local 648, and affected only Long's grocery operation at the market, that of Standard Groceteria, herein called Standard, and a few others at the market that came within the jurisdiction of Local 648.

On February 3, 1955, when two markets represented by Grocers Association located elsewhere in San Francisco were picketed by Local 648, Grocers Association announced that a strike against one of its members was a strike against all—a position it had taken during the contract negotiations—and instructed its members to lay off their employees. Long and Standard thereupon not only laid off their employees in the grocery operations involved in the dispute with Local 648 but closed down these operations. On February 12, one of Local 648's business representatives visited the market and signed up 3 of 6 operators. That evening *employees* of two of the three operators that did not sign up laid off their employees and the third stand transferred its employees to another operation. Another meeting was held on February 14, at which Haag and Green for Long met with Jinkerson and Lyons of Local 648, Brodke of Local 1017, and several representatives of other labor organizations. Jinkerson asked Haag to sign the contract proffered by Local 648. Green refused, stating that he chose to abide by the position taken by the Association. Haag told Jinkerson that there was no need to picket Crystal Palace Market because all stands

involved in the dispute had closed down, that he had his "full permission, if he so desired, to bring his pickets inside the market and picket each of the individual stands" involved in the dispute. Jinkerson replied that this would not give Local 648 the necessary economic pressure, and rejected the offer. On the morning of February 15, pickets sent by Local 648 appeared at 7 of the 11 entrances to the Crystal Palace Market;[2] the only entrances not picketed were the four in the rear of the market which face the free parking area. The picket signs made reference to Long and Standard.

Respondents contend that such picketing, whatever its impact on Long's lessees, did not violate Section 8 (b) (4) (A) of the Act because the lessees were not neutrals but allies of Long. It is clear from the record that the respective stands in the Crystal Palace Market hire their own employees, pay their own employees, and have complete autonomy in dealing with their employees concerning terms and conditions of employment. They use their own funds and purchase and sell their own merchandise. Consequently, any interest of Long, as owner of the market, is insufficient to render its lessees allies of Long. Nor is this a situation of struck work being transferred to other stands in the market. The Supreme Court in the Denver Building and Construction Council case, (NLRB vs. Denver Building & Construction Trades

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[2] These entrances are numbered 1 to 7, inclusive, in the diagram attached hereto as Appendix "C".

Council, 341 U. S. 675), in this connection, aptly stated:

> We agree with the Board also in the conclusion that the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other. The business relationship between independent contractors is too well established in the law to be overridden without clear language doing so.

Accordingly, in agreement with the Trial Examiner, we find that Long was not the employer of any of the employees working for its various lessees in the market, and that such lessees were not allies of Long, and were therefore neutral employers entitled to the protection of Section 8 (b) (4) (A) of the Act.[3]

This case thus presents the problem, with which the Board has had frequent occasion to deal, of determining the legality of picketing at a "common situs"—i.e., premises jointly occupied by primary and secondary employers. In Denver Building and Construction Trades Council, above, the Supreme Court pointed out that in such cases the Board was

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[3] See Piezonki v. NLRB, 219 F. 2d 879, 883 (C. A. 4); N. L. R. B. v. Local Union No. 135, 212 F. 2d 216 (C. A. 7) Professional and Business Men's Life Insurance Company, 108 NLRB 363, enf. 218 F. 2d 226 (C. A. 10).

required to give effect to the "dual Congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own."

In seeking to accommodate these sometimes conflicting Congressional objectives, the Board, with judicial approval, has established certain standards for "common situs" picketing. The gist of these standards is that where picketing occurs at premises which are occupied jointly by primary and secondary employers, the timing and location of the picketing and the legends on the picket signs must be tailored to reach the employees of the primary employer, rather than those of neutral employers. If these standards are observed, the picketing is lawful, and any incidental impact thereof on neutral employees at the common situs will not render it unlawful.[4] Where, however, there is any deviation from these standards, the Board, with judicial approval, has held that the picketing violates Section 8 (b) (4) (A) of the Act.[5] In devel-

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[4] Moore Dry Dock Co., 92 NLRB 547; N.L.R.B. v. Service Trade Chauffeurs, 191 F. 2d 65, 68 (C. A. 2); Piezonki v. N.L.R.B. 219 F. 2d 879, 883 (C. A. 4); Cf. N.L.R.B. v. Local 968, 225 F. 2d 205 (C. A. 5), cert. den, 350 US 914.

[5] N.L.R.B. v. Local Union No. 55, 218 F. 2d 226, 231 (C. A. 10); N.L.R.B. v. Local Union No. 135, 212 F. 2d 216, 219 (C. A. 7); Richfield Oil Corp. 95 NLRB 191; Columbia-Southern Chemical Corp., 110 NLRB 206.

oping and applying these standards, the controlling consideration has been to require that the picketing be so conducted as to minimize its impact on neutral employees insofar as this can be done without substantial impairment of the effectiveness of the picketing in reaching the primary employees.[6]

We believe, contrary to the contention of the Respondents, that the foregoing principles should apply to all common situs picketing, including cases where, as here, the picketed premises are owned by the primary employer. We can see no logical reason why the legality of such picketing should depend on title to property. The impact on neutral employees of picketing which deviates from the standards outlined above is the same whether the common premises are owned by their own employer or by the primary employer.

There is ample precedent for this view. In Professional and Business Men's Life Insurance Company, supra, the Board held that picketing of a construction site owned by the general contractor, the primary employer, violated Section 8 (b) (4) (A) of the Act because of the impact of the picketing on neutral subcontractors working on the site. This finding was approved by the Court of Appeals, which held, in effect, that the picketing was illegal because it did not conform to the limitations imposed by the Board on common situs picketing in the Moore Dry Dock case, 92 NLRB 547. In the

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[6] See Southwestern Motor Transport, Inc., 115 No. 155.

Deena Artware case,[7] Court of Appeals rejected the contention that the fact that picketing was limited to a construction site owned by the primary employer precluded, as a matter of law, a finding that the picketing violated 8 (b) (4) (A) or (B) with respect to employees of a neutral contractor who were working on the site. The court deemed controlling the object, rather than the geography, of the picketing. See, also, N.L.R.B. v. Deena Artware, Inc., 198 F. 2d 645, 653 (C. A. 6), cert. den. 345 U. S. 906.

To the extent that the decision in Ryan Construction Corp.[8] and Crump, Inc.[9] are inconsistent with the foregoing authorities and with the views expressed herein, we do not adhere to those decisions.

While the Supreme Court in the International Rice Milling case, 341 U. S. 665, 672, cited the Ryan case, such citation was merely in support of a dictum by the Court that Section 8 (b) (4) (A) was not meant to "interfere with the ordinary strike," which general statement also appears in somewhat different terms in the Board's opinion in the Ryan case. It does not necessarily follow that, by such citation, the Supreme Court meant to indicate agreement with the Board's specific holding in Ryan that, where the picketed premises are owned by the primary employer, the picketing cannot for that reason be secondary action, even

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[7] United Brick and Clay Workers v. Deena Artware, Inc., 198 F. 2d 637 (C. A. 6) cert. den. 344 U. S. 897.

[8] 85 NLRB 417.

[9] 112 NLRB 311.

though such premises are used only by employees of secondary employers. Indeed, the Supreme Court expressly stated that the fact that the inducement of neutral employees in the Rice Milling case occurred at the premises of the primary employer was not necessarily controlling in evaluating the legality of such inducement under Section 8 (b) (4) (A). In any event, the validity of the specific holding of the Board in Ryan was not in issue in the Rice Milling case. We do not believe, therefore, that the reference in that case to Ryan, *when*ever its significance, precludes our reversal of Ryan.[10]

We turn then to the question whether, in the instant case, Local 648 so conducted its picketing of the Crystal Palace Market as to minimize the impact thereof on the employees of the neutral lessees in the Market to the extent consistent with the effective exercise of its right to appeal to the employees of the primary employers. Upon the entire record, we find that it did not.

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[10] We do not mean to imply that the same considerations would apply in determining the legality of picketing at premises occupied solely by the primary employer. In such cases, we adhere to the rule established by the Board, with judicial approval, that accommodation of the policy of Section 13 of the Act (preserving the right to engage in a primary strike) requires that more latitude be given to picketing at such separate primary premises than at premises occupied in part (or entirely) by secondary employers. See N.L.R.B. v. International Rice Milling Company, 341 U. S. 665; Di Giorgio Wine Company, 87 NLRB 720, aff'd 191 F. 2d 642 (C. A. D. C.), cert. den. 342 U. S. 869 (1951); Santa Ana Lumber Co., 87 NLRB 937.

In reaching this conclusion, we rely upon the following considerations:

(1) As recited above, the day before the picketing began, Local 648 rejected Long's offer to bring the pickets inside the Market and post them at the particular stands involved in the contract dispute. Local 648 contends in its brief that it rejected this offer because it did not include permission to picket Long's nongrocery stands. Although these were not involved in the dispute, Local 648 urges that it was privileged to picket these stands, as they were manned by employees of the primary employer (Long), citing the decision of the court in NLRB v. Local 968, etc.[11] However this may be, we deem it significant that Local 648 did not propose to Long that its offer be enlarged to include the picketing inside the Market of such other operations of Long. Such "inside" picketing would have been adequate to achieve any lawful purpose of Local 648, and would have minimized the incidental effect on the neutral lessees.[12]

(2) We deem it significant also that, while, as Local 648 contends, each entrance picketed was in the immediate vicinity of one of Long's stands (grocery or nongrocery), in at least one instance Local 648 picketed 2 adjacent entrances, where the

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[11] 225 F. 2d 205 (C. A. 5), cert. den. 350 US 914.

[12] Thus, had Local 648 been content to picket alongside the various grocery and nongrocery stands operated by Long, as well as the other stands involved in the primary dispute, there would have been no need for employees of neutrals to cross any of the picket lines.

picketing of one such entrance would have been adequate to reach persons approaching Long's nearby stand. These are the Market Street entrances marked "3" and "4" on the attached diagram, where most of the pickets were concentrated. Of these, entrance "4" was the closer to Long's tobacco stand, and even if some few persons for whatever reason should use the more remote entrance 3 to reach the tobacco stand they could not fail to see any picket line at entrance 4, only a few feet away. Accordingly, it is clear that a picket line confined to entrance 4 would have adequately publicized Local 648's dispute with Long to persons using either entrance 3 or 4. The failure of Local 648 to limit the picketing to entrance 4 under these circumstances is explainable only on the ground that its strategy was not merely to reach persons having dealings with Long but also to impose the necessity of crossing a picket line upon other persons, constituting the bulk of the traffic through entrance 3, including necessarily employees of neutrals operating the stands most directly served by that entrance.

(3) Finally, as already stated, Local 1017 represented the employees of operators of a number of fruit stands in the Market, who were not involved in Local 648's contract dispute. As found by the Trial Examiner, it was the official policy of Local 1017 to support its sister local's strike by requiring its members to respect the picket line at the Mar-

ket.[13] This policy was not only announced by representatives of Local 1017 to several of the fruit dealers on the eve of the strike, but was implemented by the conduct of Savin, a business agent of Local 1017, in inducing 2 employees of Gummow, a neutral employer in the Market, to quit work during the picketing. As found by the Trial Examiner, when these 2 employees reported for work on the first day of the picketing, Savin peremptorily directed both of them to leave the Market, and they promptly complied. One of them (Andrews) did not return to work until the last day of the picketing, and then only after obtaining special permission from Savin to cross the picket line. We agree with the Trial Examiner that Local 1017 was responsible for this conduct of its business agent, Savin, which was clearly violative of Section 8 (b) (4) (A), in that it constituted specific inducement of employees of a neutral to engage in a concerted refusal to work with an object of disrupting the dealings of such neutral with others. We find also that, as Savin, at the time of this incident, was temporarily assigned to aid Local 648 in obtaining signed contracts, and was there-

[13] In its brief filed with the Board, Local 1017 asserts that while it was its "official union policy" to observe Local 648's picket line, such policy was authorized by its contracts with fruit dealers in the Market, which allegedly sanctioned the refusal of their employees to cross any picket line. However, the existence of such a contract provision was not sufficiently established by the evidence. Accordingly, apart from any other considerations, we reject this contention on evidentiary grounds.

fore subject to its control, as well as that of Local 1017, his conduct is imputable also to Local 648.[14]

In view of all the foregoing circumstances, we are satisfied that Local 648 did not make any bona fide effort to minimize the impact of its picketing upon the operations of the neutral employers in the Market, although, as shown above under (1) and (2), it might have done so without any substantial impairment of its right to exert pressure upon the primary employers through appeals to their employees. The absence of any such effort, together with the fact that Savin, in his dual capacity as agent for both Locals, directly induced

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[14] In any event, apart from Savin's temporary assignment to Local 648, his conduct is imputable to it on the ground that Locals 1017 and 648 were here engaged in a joint venture, the latter having established a picket line and the former having adopted and enforced a policy of requiring its members to respect that line. In addition to the conduct of Savin, the concert of action between the 2 Locals is shown by the circumstances that Brodke, an officer of 1017, attended the meeting at which Long proposed that the picketing by 648 be confined to the stands involved in the dispute, that Local 1017 ignored the letter of the Fruit Dealers' Association of February 14, requesting that 1017 not intervene in 648's dispute, that Brodke maintained surveillance of the picket line throughout the period of the strike, and actually walked in the line, although only for a few minutes, and that Brodke in conversations with members of his Local indicated approval of the picketing. In view of the foregoing, we find that 648 was responsible for the conduct of Savin whether acting as an agent of 648 or of 1017. Los Angeles Building and Construction Trades Council, 105 NLRB 868, 875.

neutral employees to quit work, convinces us that the involvement of neutrals and their employees in the primary dispute and the disruption of their operations was a principal object of Local 648 and not merely an unavoidable by-product of legitimate primary picketing.

For all of the foregoing reasons, we find that, by inducing and encouraging employees of stands, other than grocery stands, that are tenants of Crystal Palace Market, to engage in concerted refusals to perform work for their respective employers, with an object of forcing or requiring their respective employers to cease doing business with Long, in the latter's capacity as owner of Crystal Palace Market, and with other employers, the Respondents have engaged in unfair labor practices within the meaning of Section 8 (b) (4) (A) of the Act.

Order

Upon the basis of the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondents, Retail Fruit & Vegetable Clerks' Union, Local 1017, and Retail Grocery Clerks' Union, Local 648, both affiliated with Retail Clerks International Association, AFL-CIO, their officers, agents, successors and assigns shall:

1. Cease and desist from inducing and encouraging the employees of tenants of Crystal Palace Market, or the employees of any other employer, to engage in a strike or concerted refusal in the

course of their employment to perform services for their employer, where an object thereof is to force or require any employer or person to cease doing business with J. M. Long and Company, Inc., in its capacity as owner of the Crystal Palace Market, or with any other employer.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Post at their respective business offices copies of the notices attached hereto as Appendices A and B.[15] Copies of said notices, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by a representative of each Respondent, be posted by said Respondent immediately upon receipt thereof in conspicuous places, including all places where notices to their members are customarily posted. Reasonable steps shall be taken by said Respondents to insure that the notices are not altered, defaced, or covered by any other material.

(b) Mail to the Regional Director for the Twentieth Region signed copies of the notice attached hereto as Appendices A and B for posting at the Crystal Palace Market, J. M. Long and Company, Inc., willing, in places where notices to employees of the tenants of the market are customarily posted.

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[15] If this Order is enforced by a United States Court of Appeals, the notices shall be amended by substituting for the words "A Decision and Order" the words "A Decree of the United States Court of Appeals, Enforcing an Order."

It is further ordered that the complaint be, and it hereby is, dismissed insofar as it alleges that Local 1017 has engaged in conduct violative of Section 8 (b) (1) (A) of the Act.

Dated, Washington, D. C., August 24, 1956.

[Seal] BOYD LEEDOM, Chairman,
PHILIP RAY RODGERS, Member,
National Labor Relations Board

Stephen S. Bean, Member, concurring:

Early in the morning of February 15, 1954, Respondent Local 648 established a picket line at the main entrances to the San Francisco Crystal Palace Market, a retail food market covering several acres, in which a large number of independent stores do business. Local 648 was then engaged in a labor dispute with several of the store owners. The main issue before us is whether the picketing violated Section 8 (b) (4) (A) of the Act, which, in pertinent part, prohibits unions from inducing employees of neutral employers to cease work for the purpose of bringing about a cessation of business between the neutral employers and those employers with which the union has a labor dispute. I join in finding that the picketing in this case violated that section of the statute because I am convinced that the object of the picketing was for the very purpose of such inducement. Indeed I believe that this record permits of no other conclusion as to the true object of Local 648 that day.

As set out in detail in the Intermediate Report, there was a current dispute between Local 648 and

a group of San Francisco food retailers, including Long's Grocery Store, The Standard Groceteria, and a few other food stand operators, all located in the Crystal Palace Market. The Union was engaged in negotiating a new collective bargaining contract for employees of these particular storekeepers. Unable to achieve its economic demands, it advised the companies that it would resort to strike action. To forestall any picketing, Long and Standard, the largest employers involved, shut down their entire grocery operations on February 3, 1954. By February 14, all the remaining stores in the market involved in the dispute with Local 648 also closed down completely for the same reason.

Apart from its grocery business, Long is also the landlord of the Crystal Palace Market; the many other companies doing business there — totaling about 60—pay rent to Long as tenants. The bargaining agent for the employees of some of these tenants is Local 1017, a sister local to Respondent Local 648. Business Agent Savin of Local 1017 had been assigned to help Local 648 in its efforts to win certain economic concessions from the companies involved in the current dispute. It is admitted that there was no dispute between any employers in the market and Local 1017, and it does not appear, nor is it claimed, that any other employers there — apart from the primary companies mentioned above—were in dispute with any labor organizations.

Apparently with the hope of saving the neutral

tenants from injury, the affected storekeepers, with Long as their spokesman, invited Local 648 to picket, if it wished, their individual stands or stores inside the market itself. According to the credited testimony, Jinkerson, secretary of Local 648, rejected the offer "because it would not give Local 648 the necessary economic pressure." Without further discussion or notice, picket lines were established outside the general market entrances by 6:30 the next morning, or perhaps even earlier.

The various parties to this proceeding suggest that the basic issue to be decided is whether picketing the entrances to a general market is lawful despite the proscription set out in Section 8 (b) (4) (A) even though only a few of the independent merchants are affected by the labor dispute. The General Counsel contends that the presence in the market of neutral employers automatically makes the outside picketing unlawful. The Respondents on the other hand seek refuge in the license allegedly emerging from the rules set out in the Board's Moore Drydock decision,[16] relating to certain common situs situations in which employees of both primary and secondary companies are simultaneously at work.

As I view the total picture of this case, the issue is not so broad. We are not required to decide whether picketing of the general entrances of a market like the Crystal Palace, tenanted both by merchants involved in a labor dispute and others,

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[16] Sailors' Union of the Pacific (AFL), 92 NLRB 547.

is per se a violation of Section 8 (b) (4) (A). I believe, instead, that the only issue is whether the evidence shows that the picketing was for a proscribed object,—bringing pressure upon the disputing (primary) employers through the indirect technique of withdrawing labor from neutral (secondary) employers in order to force capitulation of the primary companies by interrupting their business relations with the neutrals.[17]

By the close of the business day of February 14, the Respondent Unions (Locals 648 and 1017) knew that there were no longer at work anywhere in the Crystal Palace any employees of the employers with whom Respondent Local 648 had a contract dispute. They also knew that all the stores and the stands involved in the dispute were completely shut down, and that, in consequence, there would be no occasion either for the buying public to approach the stores involved or for any merchandise to be delivered to them. Therefore it seems it must follow that the picketing at the outside general entrances to the market could not have had as its

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[17] Section 8 (b) (4) (A) reads:

It shall be an unfair labor practice for a labor organization or its agents—* * * to induce or encourage the employees of any employer to engage in * * * a concerted refusal in the course of their employment to * * * handle * * * any goods * * * or to perform any services, where an object thereof is * * * forcing * * * any employer * * * to cease doing business with any other person;

"It is the object of union encouragement that is proscribed by that section rather than the means adopted to make it felt." International Rice Milling, Inc. v. N.L.R.B., 341 U. S. 665, 672.

purpose an appeal to the primary employers' workmen, to the primary employers' suppliers, or to any part of the general public normally doing business with the closed establishments.

Returning to what is always the critical question in Section 8 (b) (4) (A) cases, what was the object of Local 648 in picketing the general entrances? On these simple facts, it appears quite clearly that the purpose could only have been to induce the employees and the customers of the neutral employers not to enter the market at all.[18] If this was its purpose, the picketing constituted a clear violation of Section 8 (b) (4) (A) of the statute.

The Court of Appeals decision in Otis Massey, cited by my dissenting colleagues, supports, rather than detracts from, my position here. For the very question, as I view it, is whether substantial evidence supports a finding that the Respondent's object was to enlist the aid of neutral employers through their employees. Far from mechanically applying rigid tests as to where a union may picket, I have concluded on the basis of all the evidence that the Union's purpose here was to induce the employees of neutrals. And the fact that some non-grocery operations owned by Long were open[19] does not

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[18] See Washington Coca-Cola Bottling Works, Inc. v. N.L.R.B., 220 F. 2d 380 (C. A. D. C.), enf'g 107 NLRB 229.

[19] I need not and do not decide whether Long's separate and different operations are "primary" or "secondary" with respect to Long's grocery business. Even assuming, for the purposes of this opin-

outweigh the strong and convincing evidence of the Union's unlawful objective.

This is not a case of lawful, primary picketing which only incidentally has the unavoidable effect of inducing also the employees of neutral employers.[20] There does not appear to have been any primary picketing here on the morning of February 15, 1954. The Crystal Palace Market was not then a common situs, harboring both the employees of the primary and of the secondary, neutral employers.[21] The so-called common situs cases cited by the Respondents in defense are therefore inapposite.

As my colleagues of the majority indicate, there is more in the record supporting our conclusion that the object of the picketing was secondary and therefore unlawful. In its brief to the Board, Respondent Local 648 candidly admits that the picketing was also directed against the tenant employees. Savin, the business agent of Local 1017, in furtherance

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ion, that they are technically "primary," although not at all involved in the dispute, I do not consider the fact that they remained open as significant when viewed against the closing down by all primary employers who were disputing with Local 648, the invitation to the Union to picket near those employers inside the Market, and the actions of Savin in directly inducing employees of admitted secondary employers to cease work.

[20] See Ryan Construction Company, 85 NLRB 417, referred to with approval in the Supreme Court decision in International Rice Milling Co., Inc., et al. v. N.L.R.B., 341 U.S. 665, at 672.

[21] See Moore Drydock, supra; Brotherhood of Painters, Decorators, etc. (Pittsburgh Plate Glass Company), 110 NLRB 455.

both of the policy of his local and his special assignment to assist Local 648, personally appealed of two employees of a neutral employer to quit work during the picketing. Further, in its last effort to obtain signed contracts on February 14 at the final conference preceding the picketing, the Local 648 officers were accompanied by the secretary-treasurer of Local 1017 and representatives of other labor organizations. As we know, Local 1017 represented the employees of some of the neutral merchants. Whether the other union agents also represented employees in the Crystal Market is not clear. Nonetheless their presence at that critical moment at least implied some form of collateral pressure through the representative status of these other union officials on behalf of other employees. And, finally, if the picketing had been intended only to publicize the labor dispute, instead of being aimed at the employees of the neutral companies, the Respondents could well have accepted Long's invitation to picket the primary stands only, which are dispersed in the large inside market area.

We are not called upon to decide in this case whether a shutdown of operations in anticipation of a strike ipso facto outlaws picketing of the employer's premises. All we need decide is whether under the circumstances of this case, the picketing of the premises of the neutral employers violated the statute. On the basis of the entire record, considering all the many factors detailed above, I find that the General Counsel has sustained the burden of proving that the picketing activity had an unlawful sec-

ondary object and therefore was an unfair labor practice in violation of the statute.

As to the Respondent's contention that the mere landlord-tenant relation between Long and the many tenants in the market made each of its tenants an ally of Long so as to expose all of them to any economic pressure directed against Long, I find no merit in this defense for the same reasons as those set forth by my colleagues of the majority.

Dated, Washington, D. C., Aug. 24, 1956.

STEPHEN S. BEAN, Member,
National Labor Relations Board

Abe Murdock and Ivar H. Peterson, Members, dissenting:

The record in this case shows that the Crystal Palace Market is a large retail shopping center operated and solely owned by J. M. Long & Company. While a number of stands or shops are leased to individuals under a 30-day lease arrangement, the record further shows that Long itself is by far the largest entrepreneur in its own Market. On February 4, 1955, Long and Standard Groceteria, a lessee, both members of the Retail Grocers Association of San Francisco, locked out their grocery store employees and closed down operations in these two departments because Respondent Union Local 648 in furtherance of a labor dispute with the Association had picketed two other members. On February 15, 1955, the Union placed pickets at various customer entrances to the Crystal Palace Market with signs stating that Long and Standard Groceteria

were "Unfair." The diagram attached to the majority's decision as Appendix "C" shows the location of Local 648's pickets at entrances immediately adjacent to Long's direct business activities in the Market and the extensive scope of such activities. A glance at this diagram reveals that Long's Grocery and Housewares departments are the two largest single enterprises in the Market. Almost as large are Long's Sport Shop and Appliance department. Long also operates directly two liquor and two tobacco shops. In addition, Long maintains a grocery warehouse, a carpenter shop, and a large parking area for the use of all Market customers. Except for those employees locked out of its grocery department, the record is clear that Long attempted to operate all of its remaining shops and services during the period of the picketing.

The majority finds that such peaceful picketing of a primary employer's fixed business premises is violative of Section 8 (b) (4) (A). No precedent exists for this conclusion. Indeed, such a conclusion is contrary to Board decisions beginning in 1949 and issued as recently as last year — precedents which have received the approval of the Supreme Court. Those cases hold that picketing of the type involved in this case is primary conduct and the right to engage in such conduct, protected under Sections 13 and 7 of the Act, has not been outlawed by Congress under Section 8 (b) (4). Two of the leading decisions in this area, spanning the history of the Board's and the courts' interpretation of Section 8 (b) (4) (A), were strangely ignored by the

Trial Examiner, and are now explicitly and summarily overruled in the main opinion. The first, Ryan Construction Corporation, was issued by the Board in 1949 and appears in 85 NLRB 417; the second, Crump Inc. was decided only last year and appears in 112 NLRB 311. While the concurring opinion purports not to reverse either of these decisions, we believe the necessary effect and sense of that opinion accomplishes that very purpose. Although the concurring opinion cites the Ryan case, we fail to see wherein that opinion takes cognizance of the facts and holding in that decision. What to the concurring member is "always the critical question in Section 8 (b) (4) (A) cases, what was the object of Local 648 in picketing the general entrances?", is certainly not the critical question posed squarely by the Board in Ryan, Pure Oil,[22] Crump, Inc., and other decisions. The real issue in those cases was the problem of distinguishing between primary and secondary picketing. In the Ryan case, the Board clearly held that if the Union was picketing the premises of any employer with which it had a dispute that picketing could not be "called secondary even though, as is virtually always the case, an object of the picketing is to dissuade all persons from entering such premises for business reasons." Elsewhere the concurring opinion, by some reasoning which we cannot follow, states that the premises of Long, the primary employer, are the "premises of the neutral employers."

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[22] Oil Workers International Union (The Pure Oil Co.) 84 NLRB 315.

The main opinion's explicit and the concurring opinion's implicit reversal of the Ryan and Crump Inc. decisions is, we believe, diametrically opposed to the express views of the Supreme Court of the United States. In N.L.R.B. v. International Rice Milling, 341 U.S. 665, 672, the Supreme Court, reversing the Court of Appeals for the Fifth Circuit, held that "Congress did not seek, by Section 8 (b) (4) to interfere with the ordinary strike * * * "Among others, two decisions of the Board were cited approvingly by the court as illustrative of this fundamental interpretation. With regard to the first, Ryan Construction Corporation, cited above, the Supreme Court called attention to the facts and rationale of the Board appearing on page 418 in 85 NLRB. From the facts set forth on that page it appears that the Respondent Union had made certain demands upon Bucyrus, the owner and occupier of premises upon which Ryan, the secondary employer, was engaged in a construction project. The Union picketed the entire premises including a gate which had been cut for the use of Ryan employees. The Board held that the picketing was nonetheless primary picketing and hence not violative of Section 8 (b) (4) (A). The Board's rationale, which received the approval of the Supreme Court, was as follows:

> Concededly, an object of the picketing was to enlist the aid of Ryan employees, as well as that of employees of all other Bucyrus customers and suppliers. However, Section 8 (b) (4) (A) was not intended by Congress, as legisla-

> tive history makes abundantly clear, to curb primary picketing. It was intended only to outlaw certain secondary boycotts, whereby unions sought to enlarge the economic battleground beyond the premises of the primary Employer. When picketing is wholly at the premises of the employer with whom the Union is engaged in a labor dispute, it cannot be called 'secondary' even though, as is virtually always the case, an object of the picketing is to dissuade all persons from entering such premises for business reasons."

With regard to the second Board decision, Oil Workers International Union (The Pure Oil Company), the Supreme Court called particular attention to so much of the decision appearing on pages 318 to 320 in 84 NLRB. On those pages the Board set forth the fact that the Union, engaged in a dispute with Standard Oil, picketed the latter's premises on which a neutral employer, Pure Oil, was also doing business. The Board held that the picketing was primary and the fact that it may have had a secondary effect upon employees of other employers did not "convert lawful primary action into unlawful secondary action within the meaning of Section 8 (b) (4) (A)." Presumably, the majority would reverse this decision too, along with Ryan Construction Co. and Crump, Inc.

In apparent explanation of the reversal of long established precedent, approved by the highest court in the land, the main opinion states that the legality of picketing should not depend upon "title

to property." No such issue exists in this case. Long was not an absentee owner engaged in business at any location other than the Crystal Palace Market. As set forth above and graphically illustrated in Appendix "C", it was the principal occupier of its own premises and in active control of the whole market. The Union had a legitimate dispute with Long over wages, hours and conditions of employment. Except for the grocery department, all of Long's extensive business activities continued in full operation during the picketing. The right to engage in primary picketing does not rest here upon bare legal title but upon the fact that these were the premises where the primary employer conducted his business.

Where but at the Crystal Palace Market, the only location of its business, could Long be picketed? If a Union cannot peacefully picket the premises of a primary employer at entrances customarily used by patrons and employees of that employer, what remains of the statutory right to strike? What remains of the right of employees to engage in concerted activities for their mutual aid and protection. It is small comfort to these employees to declare, as the main opinion does, that they should have requested permission from Long to picket his own stands inside the market; that one of the pickets was not close enough to a stand actually operated by Long, or that a business agent of a sister Local induced two employees of a tenant under Long's constant control to respect the picket line. Nor is it much more comfort to these employees to be told in

the concurring opinion that their pickting, otherwise lawful, suddenly became unlawful because Long had closed down his grocery department. In our opinion, this is cutting the area of lawful primary picketing to so fine a point that only the majority can see it. If criteria such as these are now to be used to find primary picketing to be secondary and a lawful strike unlawful, then the ordinary strike as we have known it in America has suffered a telling blow. For the kind of minutiae seriously advanced by the majority as the basis of its decision can be found in virtually every primary strike. The main opinion states that restrictions of this nature will not be applied to picketing at premises occupied solely by the primary employer. To support this dicta it cites the International Rice Milling case, supra, in which the Supreme Court, as indicated above, approved the Board's Ryan and Pure Oil decisions. But this concession in favor of Section 13 and 7 of the Act would appear to be more illusory than real. For the rationale and result of their decision may well be an invitation to all employers to lease out a small portion of their own premises and thereby substantially insulate themselves from the effects of a strike by their employees.

Having reversed the controlling precedents, the main opinion relies upon an entirely novel application of the Board's decision in the Moore Drydock Company, 92 NLRB 547. That case was never intended to establish a restrictive rule for picketing before the wholly owned premises of an employer with which, as here, the Union has a dispute. There

the Union's dispute was with the owner of the S. S. Phopho undergoing repairs on the premises of the Moore Drydock Company, a neutral employer. A majority of the Board in that case liberally interpreted Section 8 (b) (4) (A) to permit, under careful restrictions, a minimum of picketing before the premises of a secondary employer. This liberal interpretation of the secondary boycott provisions of the Act where premises of the secondary employer are picketed has now been converted by the main opinion into a harsher rule restricting the otherwise lawful picketing of a primary employer's premises. The main opinion goes even further to forbid the latter type of picketing than the Board and the courts have gone in forbidding picketing before a secondary employer's premises. Referring only to the "gist of these standards", and to considerations behind them, our colleagues do not state or apply the specific criteria listed by the Board in the Moore Drydock case as distinguishing primary from secondary picketing. In that case the Board said:

> "* * * we believe that picketing the premises of a secondary employer is primary if it meets the following conditions: (a) The picketing is strictly limited to times when the situs of the dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the situs; and (d) the picketing discloses

clearly that the dispute is with the primary employer.[23] (Emphasis supplied)

No member of the majority disputes the fact that the picketing in this case complies with conditions (a), (b) and (d). The implication in the main decision that the picketing was not reasonably close to Long's business activities (condition (c)) is, in our opinion, so obviously a quibble that it answers itself. Indeed, that decision obviously does not rely upon the above standards in finding that the picketing in this case violated Section 8 (b) (4) (A). Rather, it adopts a new criterion, ignoring the well established and judicially approved standards of the Moore Drydock case. The new test, announced here for the first time in order to find conduct otherwise lawful to be unlawful, is a broad generalization that the picketing union must make a "bona fide effort to minimize the impact of its picketing upon the operations of the neutral employers." No specific standards are now offered a union to guide its activities in picketing the premises occupied by two employers. Whatever a picketing union does it does at the peril of finding that this Board will regard it as evidence of bad faith and for that reason forbid all of the picketing. Thus, where a union pickets two entrances to a primary employer's premises, both entrances being used by customers and employees of that employer, under the main opinion the Board could find, as here, that this is evidence of the Union's bad faith because only one

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[23] Sailors Union of the Pacific (Moore Drydock Company) 92 NLRB at page 549.

entrance should have been picketed. A union does not, according to this view, have the choice of picketing outside a primary employer's premises, but it must make an effort to picket inside those premises, where its signs advertising the primary employer as unfair will be concealed from the general public. Failure to do this is evidence of its bad faith and a sufficient reason to find that the picketing is unlawful.

The concurring opinion presents, if that is possible, an even more radical departure from established Board and Court law in the area of secondary boycotts and primary strikes. It reverts to the literal language of Section 8 (b) (4) (A)—"the only issue is whether the evidence shows that the picketing was for a proscribed object." In so doing it ignores completely the conflict between this Section of the Act and Sections 13 and 7, a conflict that has absorbed the Board and the courts ever since passage of the amended Act. As indicated in the cases cited above, the Board has pointed out over and over again, with the approval of numerous Circuit Courts of Appeal and the Supreme Court of the United States, that there is a dual Congressional objective in this Statute, that of preserving the rights of employees to engage in the ordinary strike and that of neutral employers to be free from controversies not their own. The Supreme Court itself, in International Rice Milling, pointed out the problem of reconciling the right to strike with the language of Section 8 (b) (4) (A). Early in the history of the Act the Board accepted the difficult task

of accommodating these rights fairly and reasonably. It is too late in the day to refuse, as the concurring opinion does, to recognize the existence of a conflict in these rights when Section 8 (b) (4) is literally applied. As the Board said in the Pure Oil case, such a decision "might well outlaw virtually every effective strike, for a consequence of all strikes is some interference with business relationships between the struck employer and others." [24] To justify the conclusion that this picketing is unlawful the concurring opinion relies primarily upon the circumstances that Long and Standard Groceteria had closed down their grocery operations so that there were no employees in the Market "directly involved in the contract dispute." The record is perfectly clear, however, that all of Long's business activities, except the grocery department, continued in full operation during the period of the picketing. Moreover, four other tenants of Long were similarly involved in a contract dispute with Local 648. Although ordered by Long to remain closed, it is not clear from the record that these latter stands, in fact, remained closed after the first day of picketing. But even assuming, contrary to the fact, that all employees of the primary employers had been locked out of their jobs. it is, indeed, a most novel interpretation of Section 8 (b) (4) (A) to find that these employees could not lawfully protest their lockout to the public by picketing the premises where they had been, and hoped in the

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[24] The Pure Oil Co., supra, at page 320.

future to be, employed. Such a finding is, in our opinion, a direct infringement of the right of employees to publicize a labor dispute and to engage in concerted activity specifically guaranteed by Congress in Sections 13 and 7 of the Act. The concurring opinion suggests that an employer may effectively forestall notice to the public and its other employees that it is engaged in a labor dispute by the simple expedient of closing down its affected operations. No Board or court decision has ever held or even suggested that a union, picketing the premises of a primary employer, must limit its activity to the single group of the primary employer's employees directly involved in the dispute. The distinction made in the concurring opinion between Long's "primary stands" (those involved in the dispute) and his other stands (which it suggests to be secondary) introduces a wholly new concept. The line drawn by the Board and Courts has been between primary and secondary employers. The idea that a single employer can be secondary to himself with respect to his operations not directly involved in a dispute, and that such operations are immune to picketing, is wholly novel. Indeed, the Court of Appeals for the Fifth Circuit has gone so far recently as to reverse the Board's decision in the Otis Massey[25] case and to hold that a union may lawfully picket all employees of a primary employer, including those not involved in a labor dispute, even

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[25] N.L.R.B. v. General Drivers, Warehousemen and Helpers, Local 968, 225 F. 2d 204 (C. A. 5) cert. denied, 37 LRRM 2142, Dec. 5, 1955.

where the union appealed to such employees at premises other than those of the primary employer.

We believe the majority's decision is wrong. From it unions must now anticipate the gravest impediment to what has heretofore been their statutory and court recognized right to engage in primary strike activity.

We are further persuaded that Local 648's alternative position that all of the stand operators in the Market under license and control of J. M. Long & Company were allies rather than neutrals in this labor dispute is meritorious. Therefore there could be no unlawful secondary boycott regardless of whether the picketing was intended to affect their operations. The record shows that the Crystal Palace Market is wholly owned and directed by J. M. Long & Company. As indicated above, a number of stands in the Market are operated directly by Long. Other stands are operated by individuals under a lease arrangement with Long. These leases are terminable by Long on 30 days notice. The lessees do not pay a fixed rental for their premises. Payments are made to Long on the basis of a certain percentage of the profits of each stand, and such payments cannot fall below a specified minimum amount. Long retains the right under the lease to enter any stand at any reasonable time to see to it that the stand is being conducted in a clean and orderly fashion. Long also has the right to audit the books of the various individuals under lease. All advertising is conducted by Long for itself and all other tenants in the Market. The entire premises are

maintained by Long, including a parking lot for the use of Market customers. Under the supervision of Sidney A. Haag, a vice president, Long employs a superintendent, an advertising manager, engineers, and other employees, all for the benefit of itself and all other stand operators in the Market. Of some further significance in assessing Long's interest in the businesses of its lessees is the testimony of Haag that on February 12, 1955, he told about six stand operators involved directly in the dispute with Local 648 "* * * that in the event they decided not to sign [a contract with Local 648] that under no circumstances would I permit them to open their places on Monday morning." These facts, in our opinion, support the conclusion that the Crystal Palace Market was run as a single market enterprise under the overall control and direction of its owner, J. M. Long & Company. We therefore conclude that Long was directly involved economically and administratively in the operation of the stands of all of its lessees and that such lessees were not, in any event, independent, neutral employers entitled to the protection of Section 8 (b) (4) (A).

Dated, Washington, D. C., Aug. 24, 1956.

ABE MURDOCK, Member,

IVAR H. PETERSON, Member,

National Labor Relations Board

[Printer's Note: Appendix A and Appendix B are the same as A and B attached to the Intermediate Report set out at pages 59-61, except for the words "Pursuant to A Decision and Order.]

In The United States Court of Appeals
For The Ninth Circuit

No. 15298

RETAIL FRUIT & VEGETABLE CLERKS UNION, LOCAL 1017, and RETAIL GROCERY CLERKS UNION, LOCAL 648, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Relations Board—Series 6, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board, entitled, "Retail Fruit & Vegetable Clerks' Union Local 1017, and Retail Grocery Clerks' Union, Local 648, Retail Clerks International Association, AFL-CIO and Retail Fruit Dealers' Association of San Francisco, Inc.," the same being known as Case No. 20-CC-106, before said Board, such transcript includes the pleadings and testimony and evidence upon which the order of the Board in said proceeding was en-

tered, and includes also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Stenographic transcript of testimony taken before Trial Examiner Martin S. Bennett on May 17, 18 and 24, 1955, together with all exhibits introduced in evidence.

(2) Copy of Trial Examiner Bennett's Intermediate Report and Recommended Order dated July 19, 1955, order transferring case to the Board, dated July 19, 1955, together with affidavit of service and United States Post Office return receipts thereof.

(3) Petitioners'[1] exceptions to the Intermediate Report and Recommended Order, received August 24, 1955.

(4) Copy of Decision and Order issued by the National Labor Relations Board on August 24, 1956, together with affidavit of service and United States Post Office return receipts thereof.

In testimony whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the City of Washington, District of Columbia, this 2nd day of November, 1956.

[Seal] /s/ FRANK M. KLEILER
Executive Secretary, National Labor Relations Board.

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[1] Respondents before the Board.

[Endorsed]: No. 15298. United States Court of Appeals for the Ninth Circuit. Retail Fruit & Vegetable Clerks Union, Local 1017 and Retail Grocery Clerks Union, Local 648, Retail Clerks International Association, AFL-CIO, Petitioners-Respondents, vs. National Labor Relations Board, Respondent-Petitioner. Transcript of Record. Petition to Review and Set Aside and Petition for Enforcement of an Order of the National Labor Relations Board.

Filed: November 7, 1956.

/s/ PAUL P. O'BRIEN

Clerk of the United States Court of Appeals for the Ninth Circuit.

[Title of Court of Appeals and Cause.]

PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Petitioners, believing themselves to be aggrieved by a certain final order dated the 24th day of August, 1956, by Respondent National Labor Relations Board (herein called the Board) in a proceeding against petitioners which appears and is designated on the records of the Board as the matter of Retail Fruit & Vegetable Clerks Union, Local 1017, and Retail Grocery Clerks Union, Local 648, Retail Clerks International Association, AFL-CIO, Case No. 20-CC-106, respectfully petition this Honorable Court to review and set aside said order,

and in support of their petition respectfully show:

(1) That the unfair labor practices in question were alleged to have been engaged in and were found by the Board to have been engaged in by petitioners in the City and County of San Francisco, State of California, in this Circuit.

(2) That the principal place of business of each of the petitioners is in the City and County of San Francisco, State of California, in this Circuit. This Court, therefore, has jurisdiction of this petition.

Upon charges filed on or about the 16th day of February, 1955, by Victor J. Corsini, an individual, the General Counsel of the National Labor Relations Board on behalf of the Board issued a complaint against petitioners, alleging that petitioners had engaged in unfair labor practices affecting commerce within the meaning of Sections 8 (b) (1) (A) and 8 (b) (4) (A) of the National Labor Relations Act, as amended.

Petitioners collectively filed an answer denying the commission of the unfair labor practices set forth in the complaint.

A hearing was held at San Francisco, California, on May 17, 18 and 24, 1955, before Martin S. Bennett, the duly designated Trial Examiner.

On July 19, 1955, the Trial Examiner, Martin S. Bennett, issued his Intermediate Report and Recommended Order, containing findings of fact, conclusions of law and recommendations.

Petitioners filed timely exceptions to the Intermediate Report and Recommended Order with the Board, together with a brief in support of said ex-

ceptions. Said exceptions were denied and the Board on August 24, 1956, issued its decision and order. Such decision and order are final and petitioners have no further remedy before the Board.

A copy of the decision and order of the Board, with the report and recommended order of the Trial Examiner attached thereto are annexed hereto and made a part hereof as though set forth herein.

Specification of Errors and Statement of Points Relied On

The order of the Board is in contravention of the National Labor Relations Act, as amended; is erroneous and is beyond the power of the Board. Said order should be reviewed and set aside by this Honorable Court for the following reasons:

(1) The Board has erred in its ruling that picketing and boycotting by petitioners at the premises of the J. M. Long and Company, Inc., which company had locked out members of petitioner Retail Grocery Clerks Union, Local 648 (herein called Local 648), constituted a violation of the National Labor Relations Act, as amended.

(2) The Board erred in its ruling that where a labor organization, as petitioner Local 648 herein, is engaged in a primary labor dispute with a retail employer it may not under the law picket or boycott with signs designating the primary employer as the object thereof, on public sidewalks adjacent to the public entrances to said employer's premises if those public entrances are also used by customers and employees of other retail employers who

occupy parts of the same premises as tenants of the primary employer. This ruling of the Board is further in error in holding that petitioner Local 648 violated the Act in such circumstances by failing to enter upon the private property of the primary employer and place its pickets only in a restricted area inside said premises at the exact situs where its members customarily perform their work.

(3) The order of the Board is beyond its power to issue or enforce because it denies petitioners their rights guaranteed by the National Labor Relations Act, as amended, and by the Constitution of the United States of America to peacefully boycott and picket the business establishment of an employer with whom they are engaged in a primary labor dispute.

(4) The Board's order in the respects above stated is in direct conflict with its own decisions in similar circumstances and with the uniform course of judicial decision by this Court and by the Supreme Court of the United States, and is, therefore, without support of law.

(5) The findings of the Board upon which its order is based are unsupported by substantial evidence in the record considered as a whole.

For the foregoing reasons, the said order is contrary to law and contrary to and not supported by the findings of fact herein.

Wherefore, petitioners respectfully pray:

(1) That the said National Labor Relations

Board be required to certify for filing with the Court a transcript of the entire record of said case.

(2) That said order of the Board be set aside in whole, and vacated and annulled, and that petitioners have such other and further relief as this Court may deem just and proper.

September 17, 1956.

RETAIL FRUIT & VEGETABLE CLERKS UNION, LOCAL 1017, and RETAIL GROCERY CLERKS UNION, LOCAL 648, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO.

CARROLL, DAVIS & BURDICK

/s/ By ROLAND C. DAVIS

Attorneys for Petitioners

[Endorsed]: Filed Sept. 25, 1956. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

ANSWER OF THE NATIONAL LABOR RELATIONS BOARD AND REQUEST FOR ENFORCEMENT OF ITS ORDER

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now the National Labor Relations Board, herein called the Board, and pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Sec. 151 et seq.), herein called

the Act, files this answer to the petition to review and set aside an order of the Board, and its request for enforcement of the Board's order.

1. The Board admits the allegations contained in paragraphs 1 and 2 on pages 1 and 2 of the petition to review.

2. Answering the allegations contained on pages 2 and 3, following paragraph 2 relating to the jurisdiction of this Court, the Board prays reference to the certified copy of the entire record of the proceedings before the Board, filed herein, for a full and exact statement of the pleadings, evidence, exhibits, rulings, findings of fact, conclusions of law and order of the Board, and all other proceedings had in this matter before the Board.

3. The Board denies each and every allegation of error contained on pages 3 to 5 of the petition for review, under the title "Specification of Errors and Statement of Points Relied On," and avers that its order is proper in all respects.

Wherefore, the Board respectfully prays this Honorable Court that said petition, insofar as it prays that the Board's order be set aside, be denied.

Further answering, the Board, pursuant to Section 10 (e) and (f) of the Act, respectfully requests this Honorable Court for enforcement of the order, issued by the Board on August 24, 1956 in proceedings before it entitled "In the Matter of Retail Fruit & Vegetable Clerks' Union, Local 1017, and Retail Grocery Clerks' Union, Local 648, Retail Clerks International Association, AFL, and Retail Fruit Dealers' Association of San Francisco, Inc.," being

Case No. 20-CA-106 on the docket of the Board. In support of this request, the Board respectfully shows:

(a) Petitioners are labor organizations which transact business within the State of California, within this judicial circuit. The unfair labor practices found by the Board occurred in San Francisco, California, similarly within this judicial circuit. This Court has jurisdiction of the petition herein and of this request for enforcement by virtue of Sections 10 (e) and (f) of the Act.

(b) Upon proceedings in the said case before the Board, including complaint, answer, hearing to receive evidence, intermediate report of the trial examiner and exceptions filed thereto, as more fully shown by the certified record filed herewith, the Board on August 24, 1956, duly stated its findings of fact and conclusions of law, and issued an order directed to petitioners, their officers and agents, successors and assigns.

So much of the aforesaid order as relates to this proceeding provides as follows:

Order

Upon the basis of the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act as amended, the National Labor Relations Board hereby orders that Respondents, Retail Fruit & Vegetable Clerks' Union, Local 1017, and Retail Grocery Clerks' Union, Local 648, both affiliated with Retail Clerks International Association, AFL-CIO, their officers, agents, successors and assigns shall:

1. Cease and desist from inducing and encouraging the employees of tenants of Crystal Palace Market, or the employees of any other employer, to engage in a strike or concerted refusal in the course of their employment to perform services for their employer, where an object thereof is to force or require any employer or person to cease doing business with J. M. Long and Company, Inc., in its capacity as owner of the Crystal Palace Market, or with any other employer.

2. Take the following affirmative action, which the Board finds will effectuate the polices of the Act:

(a) Post at their respective business offices copies of the notices attached hereto as Appendices A and B.[15] Copies of said notices, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by a representative of each Respondent, be posted by said Respondent immediately upon receipt thereof in conspicuous places, including all places where notices to their members are customarily posted. Reasonable steps shall be taken by said Respondents to insure that the notices are not altered, defaced, or covered by any other material.

(b) Mail to the Regional Director for the Twentieth Region signed copies of the notice attached

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[15] If this Order is enforced by a United States Court of Appeals, the notices shall be amended by substituting for the words "A Decision and Order" the words "A Decree of The United States Court of Appeals, Enforcing An Order."

hereto as Appendices A and B for posting at the Crystal Palace Market, J. M. Long and Company, Inc., willing, in places where notices to employees of the tenants of the market are customarily posted.

(c) On August 24, 1956, the Decision and Order was served by sending a copy thereof, post paid, bearing a Government frank by registered mail to Petitioners' counsel, Roland C. Davis, at 900 Balfour Building, San Francisco 4, California.

(d) Pursuant to Sections 10 (e) and (f) of the Act, the Board is certifying and herewith filing a transcript of the entire proceedings before the Board, including the pleadings, evidence, findings of fact, conclusions of law and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of filing of this answer and request for enforcement and of the certified record, to be served upon Petitioner, and that this Court take jurisdiction of the proceedings and of the questions determined therein and make and enter upon the pleadings, evidence, and proceedings set forth in said record, and upon so much of the order made therein, as is set forth hereinabove, a decree denying the petition to set aside and enforcing the order of the Board.

Dated at Washington, D. C., this 2nd day of November, 1956.

/s MARCEL MALLET-PREVOST
Assistant General Counsel, National
Labor Relations Board

[Printer's Note: Appendix A and B are the same as Appendix A and B attached to the Inter-

mediate Report, set out at pages 59-61, except for the words "Pursuant to A Decision and Order."]

[Endorsed]: Filed Nov. 7, 1956. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS TO BE RELIED ON BY PETITIONERS

The petitioners, Retail Grocery Clerks Union, Local 648, and Retail Fruit and Vegetable Clerks Union, Local 1017, will rely upon the following points on their Petition for Review herein:

1. The National Labor Relations Board has erred in its ruling that picketing and boycotting by petitioners at the premises of the J. M. Long and Company, Inc., which company had locked out members of petitioner Retail Grocery Clerks Union, Local 648 (herein called Local 648), constituted a violation of the National Labor Relations Act, as amended.

2. The National Labor Relations Board erred in its ruling that where a labor organization, as petitioner Local 648 herein, is engaged in a primary labor dispute with a retail employer it may not under the law picket or boycott with signs designating the primary employer as the object thereof, on public sidewalks adjacent to the public entrances to said employer's premises if those public entrances are also used by customers and employees of other retail employers who occupy parts of the

same premises as tenants of the primary employer. This ruling of the National Labor Relations Board is further in error in holding that petitioner Local 648 violated the Act in such circumstances by failing to enter upon the private property of the primary employer and place its pickets only in a restricted area inside said premises at the exact situs where its members customarily perform their work.

3. The order of the National Labor Relations Board is beyond its power to issue or enforce because it denies petitioners their rights guaranteed by the National Labor Relations Act, as amended, and by the Constitution of the United States of America to peacefully boycott and picket the business establishment of an employer with whom they are engaged in a primary labor dispute.

4. The National Labor Relations Board's order in the respects above stated is in direct conflict with its own decisions in similar circumstances and with the uniform course of judicial decision by this Court and by the Supreme Court of the United States, and is, therefore, without support of law.

5. The findings of the National Labor Relations Board upon which its order is based are unsupported by substantial evidence in the record considered as a whole.

Dated November 27, 1956.

CARROLL, DAVIS & BURDICK

/s/ ROLAND C. DAVIS

Attorneys for Petitioners

[Endorsed]: Filed Nov. 28, 1956. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

PETITIONERS' DESIGNATION OF THE RECORD

Petitioners hereby designate the following portions of the record of these proceedings before the National Labor Relations Board as material to their Petition to Review and Set Aside the Order of the National Labor Relations Board in the above matter:

1. The charge filed February 16, 1955 (General Counsel Exhibit 1-A).

2. The complaint issued by the Regional Director of the National Labor Relations Board on April 25, 1955 (General Counsel Exhibit 1-C.)

3. Answer to the complaint filed May 5, 1955 (General Counsel Exhibit 1-G).

4. Amendment to answer (General Counsel Exhibit 1-H).

5. Intermediate report and recommended order of the Trial Examiner, Martin S. Bennett, dated July 19, 1955.

6. Respondents' exceptions to Trial Examiner's intermediate report and recommended order dated August 22, 1955.

7. Decision and order of National Labor Relations Board dated August 24, 1956.

8. The entire reporter's transcript of testimony at the hearings held before the Trial Examiner on the 17th, 18th and 24th days of May, 1955.

In addition to the above set forth designation, petitioners suggest, pursuant to Rule 34(9) of the

Rules of this Court, that the following original exhibits certified to the Court as a part of the record should be inspected by the Court in lieu of printing or the making of copies thereof:

1. General Counsel Exhibit 19, being a map of the premises of the J. M. Long and Company, Inc., known as the Crystal Palace Market.

2. Respondents' Exhibits 1 through 8, being photographs of picket line activity at the premises of the J. M. Long and Company, Inc.

3. Respondents' Exhibits 13 and 14, being photographs of the interior of the premises of the J. M. Long and Company, Inc., i.e., the Crystal Palace Market.

Dated November 27, 1956.

CARROLL, DAVIS & BURDICK
/s/ ROLAND C. DAVIS
Attorneys for Petitioners

Certificate of Service by Mail Attached.

[Endorsed]: Filed November 28, 1956. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS RELIED ON BY THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now the National Labor Relations Board, respondent and cross-petitioner herein, and pur-

suant to Rule 17(6) of the Rules of this Court, files this statement of points upon which it intends to rely in the above-entitled proceeding:

1. The Board correctly found that the petitioning unions, by picketing, boycotting and oral appeals, induced and encouraged the employees of tenants of Crystal Palace Market to engage in a strike or concerted refusal in the course of their employment to perform services for their employers, with an object of forcing or requiring their and other employers to cease doing business with the owner of Crystal Palace Market, J. M. Long and Company, or with any other employer, all in violation of Section 8 (b)(4)(A) of the National Labor Relations Act, as amended.

2. The findings and conclusions of fact of the National Labor Relations Board upon which it determined that petitioning unions violated Section 8 (b)(4)(A) of the National Labor Relations Act, as amended, are supported by substantial evidence on the record as a whole.

3. The order of the National Labor Relations Board against petitioning unions is valid and proper in all respects.

Dated at Washington, D. C. this 3rd day of December, 1956.

/s/ MARCEL MALLET-PREVOST
Assistant General Counsel, National Labor Relations Board

[Endorsed]: Filed December 5, 1956. Paul P. O'Brien, Clerk.

Before the National Labor Relations Board
Twentieth Region

Case No. 20-CC-106

In the Matter of RETAIL FRUIT AND VEGETABLE CLERKS' UNION No. 1017, GROCERY CLERKS' UNION No. 648 and RETAIL FRUIT DEALERS' ASSOCIATION OF SAN FRANCISCO, INC.

TRANSCRIPT OF PROCEEDINGS

Room 232, Appraisers Building, 630 Sansome Street, San Francisco, California, Tuesday, May 17, 1955.

Pursuant to Notice, the above-entitled matter came on for hearing at 10 o'clock, a.m.

Before: Martin S. Bennett, Esq., Trial Examiner.

Appearances: Robert V. Magor, Esq., 630 Sansome Street, San Francisco, California, appearing on behalf of the General Counsel, National Labor Relations Board. Carroll, Davis & Burdick, Esqs., by Roland C. Davis, Esq. 351 California Street, San Francisco, California, appearing on behalf of the Respondents. [1]*

Proceedings

Trial Examiner Bennett: The hearing will be in order.

This is a formal hearing before the National La-

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

bor Relations Board in the matter of Retail Fruit and Vegetable Clerks' Union, Local 1017, and Grocery Clerks' Union, Local 648, et al, Case No. 20-CC-106.

The Trial Examiner conducting the hearing is Martin S. Bennett.

I will ask Counsel to state their appearances for the record in the following order: For the General Counsel?

Mr. Magor: Robert Magor, 630 Sansome Street, San Francisco, California.

Trial Examiner Bennett: Is there an appearance for the Charging Party, Mr. Magor?

Mr. Magor: No—Did you intend to enter an appearance?

Mr. Corsini: Yes, I do; Victor J. Corsini, Executive Secretary, Retail Fruit Dealers' Association, of San Francisco.

Trial Examiner Bennett. And your address?

Mr. Corsini: 2418 Lombard.

Trial Examiner Bennett: San Francisco?

Mr. Corsini: San Francisco.

Trial Examiner Bennett: For the Respondents?

Mr. Davis: Carroll, Davis & Burdick, Attorneys-at-Law, 351 California Street, by Roland C. Davis, for the two Respondents. [3]

Trial Examiner Bennett: The two Locals?

Mr. Davis: Yes. As I read the Complaint, Mr. Trial Examiner, those are the only two Respondents.

Trial Examiner Bennett: I haven't seen the Complaint as yet.

Are there any other appearances to be made?

(No response.)

I gather not.

The Official Reporter makes the only official transcript of these proceedings and all citations in briefs and arguments must refer to the Official Record.

The Board will not certify any transcript other than the official transcript to be used in any Court litigation.

All matter that is spoken in the Hearing Room while the hearing is in session is reported by the Official Reporter, unless I specifically direct off the record discussion.

An automatic exception will be allowed to all adverse rulings, and upon appropriate order an objection and exception will be permitted to stand to an entire line of questioning.

All exhibits offered in evidence shall be in duplicate, and it will be the responsibility of the party offering such exhibit to submit a copy before the close of the hearing.

The parties shall be entitled to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. [4]

The parties shall also be entitled to file briefs or proposed findings and conclusions, or both.

I shall, before the close of the hearing, fix the time for such filing.

I will now instruct the Reporter to take down

everything that is stated here, unless I specifically direct that we go off the record.

Will you proceed, Mr. Magor.

Mr. Magor: At this time, Mr. Trial Examiner, I propose to offer in evidence the formal documents in this case, which I have marked in pen for identification purposes as follows:

The Charge in this matter, Case No. 20-CC-106, date filed, 2/16/55, by Victor J. Corsini, Executive Secretary of the Retail Fruit Dealers' Association of San Francisco, Inc., and its members, I have marked for identification purposes as General Counsel's Exhibit 1-A.

The Affidavit of Service of the copy of the Original Charge, the date of mailing being February 16, 1955, to which is attached Return Post Office Receipts, I have marked for identification purposes as General Counsel's Exhibit 1-B.

The Complaint in this matter, issued on the 25th day of April, 1955, I have marked for identification purposes as General Counsel's Exhibit 1-C.

The Notice of Hearing, issued on the 25th day of April, 1955, I have marked for identification purposes as General [5] Counsel's Exhibit 1-D.

The Affidavit of Service of the Notice of Hearing, Charge, and Complaint, the date of mailing being April 25, 1955, to which is attached the Return Post Office receipts, I have marked for identification purposes as General Counsel's Exhibit 1-E; and the Affidavit of Service by mail of a copy of the Answer on Victor J. Corsini, the Executive Secretary of the Retail Fruit Dealers' Association of

San Francisco, Inc., dated May 4, 1955, received by the Regional Office on May 5, 1955, I have marked for identification purposes as General Counsel's Exhibit 1-F.

The Answer to the Complaint, received by the Regional Office on May 5, 1955, I have marked for identification purposes as General Counsel's Exhibit 1-G.

I am also at this time offering duplicate copies of those exhibits and hand them to the parties entering an appearance, for their examination.

Trial Examiner Bennett: Are there any objections?

Mr. Magor: Formally offer them into evidence.

Mr. Davis: No objection.

Trial Examiner Bennett: They may be received. We will take a five minute recess while I look over the formal papers.

Mr. Davis: Before the recess, Mr. Trial Examiner, I'd like to make a brief motion for leave to amend Respondents' Answer. I discovered in examining the Pleadings last night [6] that inadvertently Respondents Answer omitted any reference to Paragraph Five of the Complaint, and I have therefore prepared an Amendment to the Answer, including reference to Paragraph Five.

I so move at this time.

Trial Examiner Bennett: You wish to physically change something in the Original Answer, or——

Mr. Davis: I have prepared a document entitled, "Amendment to Answer to Complaint," which I'd like to introduce in connection with my motion.

Trial Examiner Bennett: Why don't we add that onto the formal papers?

Mr. Magor: No objection.

Trial Examiner Bennett: Let's have that marked as 1-H, and I will pass on that at the same time as I pass on the others.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 1-H for identification.)

Mr. Davis: Let the record show I hand the Trial Examiner the original and one copy of the Amendment to the Answer.

Trial Examiner Bennett: The record may so show.

Mr. Davis: And a copy to Counsel for the Board, and a copy to Mr. Corsini.

Trial Examiner Bennett: We will take a five minute recess. [7]

Mr. Magor: Before you recess, I want to make a motion to amend.

Trial Examiner Bennett: All right.

Mr. Magor: I direct your attention, Mr. Trial Examiner, to Paragraph One of the Complaint, Subsection (b).

Trial Examiner Bennett: Which, (b)?

Mr. Magor: (b), as in Baker.

I move to amend the Complaint to strike out the words, "labor organizations, including," and insert after the words, "Local 648," the words, "a labor organization"; so corrected, it should read as follows: "Grocers' Association, among its other

functions, has been designated and recognized as the sole collective bargaining agency for a multi-employer unit, to represent and sign collective bargaining agreements with Respondent Local 648, a labor organization, covering wages, hours, and working conditions for certain employees of the below-named employers," and then including Subsection (1) and (2) thereof.

Trial Examiner Bennett: Any objection?

Mr. Davis: No objection.

Mr. Magor: It is my understanding, Counsel, that we may stipulate to Paragraph One of the Complaint, the facts therein stated.

Mr. Davis: That is true, Counsel, through Paragraphs (a) and (b). I am not prepared to stipulate to Sub-paragraph (1) [8] under (b), in that I don't have the knowledge of the numbers of member employers referred to there.

Trial Examiner Bennett: Do you stipulate as to Sub-paragraph (c)? Of Paragraph (1)?

Mr. Davis: Yes.

Mr. Magor: What do you stipulate to now, (a)?

Mr. Davis: (a), (b), with the exception of Sub-paragraph (1).

Mr. Magor: And (c)?

Mr. Davis: That is correct, (c), I'm sorry.

Mr. Magor: I will so stipulate.

Trial Examiner Bennett: As I understand it, the parties have stipulated to Paragraph I of the Complaint, with the exception of Sub-paragraph (b) (1)?

Mr. Davis: That is correct.

Trial Examiner Bennett: Is that correct, sir?

Mr. Magor: Correct.

Trial Examiner Bennett: All right, so stipulated.

I will grant the General Counsel's motion to amend the Complaint, and also entertain Respondents' Amended Answer at this time, and we will take a five minute recess.

(Short recess.)

Trial Examiner Bennett: On the record.

I will receive General Counsel's Exhibits 1-A through H, inclusive. That includes the Amended Answer. [9]

(The documents heretofore marked General Counsel's Exhibits Nos. 1-A through 1-H for identification, were received in evidence.)

Trial Examiner Bennett: Will you proceed, Mr. Magor.

Mr. Magor: Yes.

Mr. Tissier, will you take the stand, please.

Mr. Tissier: Do I have to move way over there?

Trial Examiner Bennett: It might be desirable.

FRANCIS A. TISSIER

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Magor): Mr. Tissier, would you state your name and address for the record?

A. Francis A. Tissier, T-i-s-s-i-e-r.

Q. Are you appearing here under subpoena?

A. Yes. 525 Market Street—Want the address?

(Testimony of Francis A. Tissier.)

Q. Yes. A. 525 Market Street.

Q. San Francisco? A. San Francisco.

Q. What is your business or occupation, Mr. Tissier?

A. Secretary of the Retail Grocers' Association of San Francisco, Limited.

Q. And how long, sir, have you held that position? [10]

A. Since the first of April, 1927.

Q. Will you tell us briefly, what are your duties as Secretary?

A. Well, the Retail Grocers' Association is a trade association, composed of retail grocers in the City and County of San Francisco, and a few adjacent to San Francisco County, like the northern section of San Mateo County, and our Association primarily organizes for the purpose of protecting its members as stated in the Constitution and By-laws. We do any type of service that is necessary in the conduct of the business of the members of the Association.

Trial Examiner Bennett: How many members are there in the Association?

The Witness: Oh, approximately 550 stores in San Francisco.

Q. (By Mr. Magor): And——

A. It varies according to——

Q. And is each store a member, Mr. Tissier?

A. Yes.

Q. Are some of the stores owned—or, strike that.

(Testimony of Francis A. Tissier.)

Do some of the members own more than one store? A. Yes.

Q. Approximately how many members do you have in the Association, as such?

A. Well, the membership fluctuates. It normally is around [11] 500. The additions are the multiple stores.

Q. Do you have Powers-of-Attorney from your members to engage in collective bargaining with Local 648? A. We do, yes.

Q. Did you have a contract with Local 648 in February—Strike that.

When was the last contract you had with Local 648 prior to February of 1955?

A. We had a contract that we signed, which was executed—I don't know the exact date—sometime in January or February of 1950. It was dated December the 31st, 1949, and was a five year contract, ran up to the 1st of January, 1955.

Q. And were there amendments to that contract?

A. Each year there were amendments in reference to the wage scale only. I have a complete copy of it here, at your request.

Q. And per my request, have you brought a copy of the contract, as well as all the amendments?

A. Yes, that is it right there.

Trial Examiner Bennett: Do I understand that that is an Association-wide contract, for all the members?

(Testimony of Francis A. Tissier.)

The Witness: For all the members that we hold Powers-of-Attorney for, yes.

Mr. Magor: I have marked for identification, Mr. Trial Examiner, the contract referred to, as General Counsel's Exhibit No. 2 for identification, copy of a letter, effective [12] January 1, 1951, as General Counsel's Exhibit No. 3 for identification; copy of a letter, January 29, 1952, wage rates, 1952, as General Counsel's Exhibit No. 4 for identification; copy of a letter, February 11, 1953, memorandum agreement between Retail Grocers' Association of San Francisco and Grocery Clerks' Union Local 648, as General Counsel's Exhibit 5 for identification.

A copy of a letter, February 4, 1954, Amendment to Section 6, Wage and Classifications, as General Counsel's Exhibit 6 for identification purposes.

I now show them to Counsel.

Mr. Davis: Well, just to clear the record, Counsel, you have referred to these documents as letters. They don't seem to me to fit the usual definition of a letter, in that they are not addressed to anyone, nor are they signed by anyone. I don't know what they are.

Trial Examiner Bennett: Let's find out from the witness what they are.

Mr. Davis: I just wanted to make that clear.

Q. (By Mr. Magor): I show you General Counsel's Exhibit No. 3 for identification, sir, and ask you if you can identify that.

A. Well, this is merely a copy sent to the mem-

(Testimony of Francis A. Tissier.)

bership, "Committees of both the Association and the Union agreed to accept the compromise and thus the new wage scale, starting [13] January 1, 1951, will be as follows," and the designated number of hours, wages and so on.

Trial Examiner Bennett: If I follow you correctly, you are saying that that is an amendment agreed to in 1951?

The Witness: Yes, these are all the agreements in reference to the wage scale, and that was the only thing that we reopened on each year.

Q. (By Mr. Magor): Who was the agreement with?

A. With the Retail Grocery Clerks' Union.

Trial Examiner Bennett: Was there a signed original?

The Witness: Oh, yes, Mr. Jinkerson and I usually sign a memorandum of some kind.

Trial Examiner Bennett: This then, if I follow you, is a copy, unsigned, circulated to your members?

The Witness: To our membership, yes.

Q. (By Mr. Magor): Do you have the signed original?

Mr. Davis: I have no objection—I don't think it is competent evidence, but I have no objection.

Q. (By Mr. Magor): Would the same thing be true then—— A. Of each one, yes.

Q. ——of each one of them? A. Yes.

Mr. Magor: I formally offer General Counsel's

(Testimony of Francis A. Tissier.)

Exhibits 2 through 6, and each of them, into evidence.

Trial Examiner Bennett: Is there any objection?

Mr. Davis: No.

Trial Examiner Bennett: They may be received.

(Thereupon, the documents above referred to were marked General Counsel's Exhibits Nos. 2 through 6 for identification and received in evidence.)

Mr. Magor: I direct the Trial Examiner's attention to Section One of the Contract, which is the recognition clause; Section Three, the employment of Union members; Section Six, the wage and classification, showing employees covered; Section Nineteen, showing the duration of the agreement.

Trial Examiner Bennett: Had there been prior Association-wide agreements with this same Union?

The Witness: Since 1937, yes.

Trial Examiner Bennett: And recognition has been continuous since 1937?

The Witness: Yes, that is correct.

Trial Examiner Bennett: Has bargaining been on an Association-wide basis since 1937?

The Witness: Yes.

Mr. Magor: In lieu of your questions, Mr. Trial Examiner, I ask you to take judicial knowledge of a Representation case, 20-RC-695, and I ask you to take judicial knowledge of the Petition, the Agreement for Consent Election and Tally of Bal-

(Testimony of Francis A. Tissier.)

lots, and the certification of Local 648 of this Association, dated December 2, 1949. [15]

Mr. Davis: Counsel, may I inquire, this evidence that you are referring to and the testimony you have elicited with respect to this contract and the Association goes to the matters contained in Paragraph One of your Complaint, do they not, to which we have stipulated?

Mr. Magor: The contract goes not only to Paragraph One, but it goes to Paragraphs Seven, Eight and so on, with respect to the dispute existing between the Association and Local 648.

Mr. Davis: I have heard nothing about any dispute so far. I was asking about what you already introduced.

Mr. Magor: It is preliminary. I will bring it out.

Mr. Davis: I don't doubt that, but I was just trying to save a little time. We have just agreed to all of this.

Q. (By Mr. Magor): Now, do you have a letter dated October 29, 1954, Mr. Tissier?

A. I prefer to give you the copies and keep the original.

Q. Do you have the original? A. Yes.

Mr. Magor: I will show it to Counsel, and maybe we can reach an agreement.

The Witness: Here are the copies; you'd better show him they are exactly alike. I think we have got a pretty good stenographer.

Q. (By Mr. Magor): Yes, sir.

(Testimony of Francis A. Tissier.)

A. That is from the Union, yes. [16]

Mr. Davis: These are copies?

Mr. Magor: Yes.

Mr. Davis: Yes; there is no objection.

Mr. Magor: Since there is no objection, I will mark for identification a copy of this letter as General Counsel's Exhibit No. 7.

Trial Examiner Bennett: 7. This purports to be what, now?

Mr. Magor: This is a letter dated October 29, 1954, addressed to Mr. F. A. Tissier, Secretary, and signed by C. H. Jinkerson.

I offer two copies in the exhibit file.

Trial Examiner Bennett: Any objection?

Mr. Davis: No objection.

Trial Examiner Bennett: It may be received.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 7 for identification and received in evidence.)

The Witness: May I——

Q. (By Mr. Magor): Do you have the original copy that you sent the Union?

A. Well, I have the original copy of what I sent to the Union. Naturally, I wouldn't have the original.

Q. I asked you if you had the original copy.

A. Original copy; this is the original copy, and here are [17] copies for your file.

Mr. Magor: All right. I have marked for identification purposes a letter dated October 28, 1954,

(Testimony of Francis A. Tissier.)

addressed to Retail Grocery Clerks Union, Local 648, signed by F. A. Tissier, Secretary.

Stipulate this letter was received in the normal course of mail?

Mr. Davis: So stipulated.

Mr. Magor: I formally offer into evidence General Counsel's Exhibit 8, with a copy for the exhibit file, and, if I have not already done so, I formally offer General Counsel's Exhibit No. 7 into evidence.

Trial Examiner Bennett: 7 has been received.

Q. (By Mr. Magor): After the letters dated——

Trial Examiner Bennett: Just a moment. I gather there is no objection to 8?

Mr. Davis: No objection.

Trial Examiner Bennett: It may be received.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 8 for identification and received in evidence.)

Q. (By Mr. Magor): After the letters dated October 28th and October 29th, 1954, Mr. Tissier, was any meeting held with Local 648 with respect to a new contract?

A. The first meeting was held November the 10th, 1954, in [18] my office, of the Retail Grocers' Association, 525 Market Street. I think it was about ten o'clock in the morning, 10:00 a.m., and the Union was represented by Mr. Roland Davis, Mr. Claude Jinkerson, Mr. Larry Vail, Mr. Robert Hunter, Mr. Maurice Hartshorn and Mr. Eric Lyons.

(Testimony of Francis A. Tissier.)

Q. Will you tell us who Mr. Jinkerson is, to your knowledge? A. Who?

Q. Mr. Jinkerson?

A. He is the Secretary of Local 648.

Q. How about Mr. Larry Vail, who is he, to your knowledge?

A. I understand he is—What? Is he State Secretary of the Grocery Clerks Union?

Trial Examiner Bennett: Perhaps Counsel can stipulate as to the titles.

Mr. Magor: Surely.

Q. (By Mr. Magor): How about Mr. Bob Hunter, who is he?

A. Mr. Hunter and Mr. Hartshorn and Mr. Lyons were—are the Business Agents, those three.

Q. Who was present for the Association?

A. Mr. Hoerchner and myself; Mr. E. R. Hoerchner, H-o-e-r-c-h-n-e-r. He is the attorney for the Association—and myself.

Q. Now, you have the Powers—a list of the Powers-of-Attorney for the Association?

A. Yes, we have the list of Powers-of-Attorney that we [19] presented to the Union that afternoon, and they checked them off.

Q. Will you speak up, sir?

A. We have the list, complete, turned over to the Union, and some additions that came in afterwards, which were transmitted to the Union. Do you want the whole file?

Q. Yes, if I may, please. There's three or four copies here.

(Testimony of Francis A. Tissier.)

Trial Examiner Bennett: If I understood a prior answer of yours correctly, you had these Powers-of-Attorney at the time you entered into the 1949 Agreement?

The Witness: 1949? Well, each year we have presented the Union with a revised list of Powers-of-Attorney, so that they can check those that are still with us and those that have left, and the additions.

Trial Examiner Bennett: So at the time this last five year agreement was entered into, you had Powers-of-Attorney from all your members?

The Witness: That's the one we are speaking of now, in 1954, is that right?

Trial Examiner Bennett: I am talking about this Agreement that has been received in evidence, which was executed on December 31st, 1949.

Th Witness: Oh, yes, they had a complete list then.

Mr. Magor: I have marked for identification purposes as [20] General Counsel's Exhibit No. 9 the copy—list of Powers-of-Attorney to Grocery Clerks Union, Local 648, A.F. of L., November 10, 1954. It is a document of one—seven pages, and I show it to Counsel for his examination.

Here is a copy that you can watch as we go along.

It will be stipulated that the Union received this list on November 10th?

Mr. Davis: So stipulated.

(Testimony of Francis A. Tissier.)

Mr. Magor: I formally offer into evidence General Counsel's Exhibit No. 9.

Trial Examiner Bennett: Any objection?

Mr. Davis: No objection.

Trial Examiner Bennett: It may be received.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 9 for identification and received in evidence.)

Mr. Magor: Now, I am going to identify certain letters that I have marked for identification purposes.

Mr. Davis: Oh, here.

Trial Examiner Bennett: As I understand it, this is a list of the Powers-of-Attorney held by your Association, and you mailed copies of this list to the Union?

The Witness: We handed them the list in our office, and they checked with our Field Secretary and my assistant in the office. [21]

Trial Examiner Bennett: All right.

Mr. Magor: I formally offer General Counsel's Exhibit 9.

Trial Examiner Bennett: It is received.

Mr. Magor: I have marked for identification purposes copies of letters, the first one being November 15, 1954, addressed to Grocery Clerks Union, Local 648, signed by F. A. Tissier, Secretary, as General Counsel's Exhibit 10-A; the next one is a letter, copy of a letter dated November 18, 1954, to the same addressee, and signed by F. A. Tissier, Secretary, as General Counsel's Exhibit 10-B; as

(Testimony of Francis A. Tissier.)

General Counsel's Exhibit 10-C for identification, a letter dated November 23, 1954, to the same addressee, and it indicates the same signatory, F. A. Tissier, Secretary. In fact, all letters that I am referring to are sent to the Grocery Clerks Union, Local 648, and indicate they were signed by F. A. Tissier, Secretary.

The next one is General Counsel's Exhibit 10-D, a letter, copy of a letter dated December 6th, 1954, and as General Counsel's Exhibit 10-E, a letter dated December 15th, 1954; as General Counsel's Exhibit 10-F, a letter dated December 17th, 1954, and as General Counsel's Exhibit 10-G, a letter dated January 11, 1955.

May it be stipulated that such letters were received by the Union?

Mr. Davis: So stipulated.

Mr. Magor: In the normal course of mail? [22]

Mr. Davis: So stipulated.

Mr. Magor: I formally offer into evidence General Counsel's Exhibits 10-A through 10-G, inclusive.

Trial Examiner Bennett: They are received.

(Thereupon the documents above referred to were marked General Counsel's Exhibits Nos. 10-A through 10-G, inclusive, for identification and received in evidence.)

Mr. Magor: I have marked for identification purposes as General Counsel's Exhibit 11, a document headed, "List of Members Represented by

(Testimony of Francis A. Tissier.)

Power-of-Attorney: Amendment to November 10, 1954, dated March 29, 1955,"——

Q. (By Mr. Magor): And I ask you, Mr. Tissier, if you can identify that?

A. Yes. This is a copy of probably one of the last letters that went in there. Is there one dated this particular date?

Q. I don't recall, sir.

A. Well, they received a copy.

Q. That's a list of members of your Association?

A. Yes, that's an additional list. Undoubtedly, that was not on the first mailing.

Trial Examiner Bennett: This is a list of names furnished to the Union?

The Witness: Yes.

Trial Examiner Bennett: On that date?

The Witness: Yes.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 11 for identification.) [23]

Mr. Magor: I formally offer into evidence General Counsel's Exhibit 11.

Trial Examiner Bennett: Any objection?

Mr. Davis: Yes, I would like to ask Mr. Tissier some questions. I don't understand his testimony as to what this document is. It has no——

Trial Examiner Bennett: The last one?

Mr. Davis: Yes.

Trial Examiner Bennett: Proceed.

Mr. Davis: Mr. Tissier, is it your testimony that—You have the document in front of you?

(Testimony of Francis A. Tissier.)

The Witness: No, let me look at all that whole bunch. You have got a whole file on it—Oh, you got them all there.

Mr. Davis: I believe it is the first one of the series—no, on top.

The Witness: Well, this is the last one.

Mr. Davis: Yes. That is the one that is now being offered by the Counsel for the General Counsel.

Trial Examiner Bennett: That is a later date than any of those received as part of Exhibit 10?

Mr. Davis: Yes. Now, Mr. Tissier, did you—is it your testimony that you furnished the Union with this list that you are now looking at, that has been offered here as General Counsel's Exhibit 11?

Not—I am asking you if with respect to this document [24] here——

The Witness: We are talking about this one here? Yes, we sent that.

Mr. Davis: When?

The Witness: Dated March 29.

Mr. Davis: How did you send it?

The Witness: By mail.

Mr. Davis: With a letter?

The Witness: I don't see a letter here. Of course you realize from February until March we were way behind in our work.

Mr. Davis: Well, can you answer my question? Did you send this list with a letter, or include it in a letter, or in what manner did you convey this

(Testimony of Francis A. Tissier.)

list to the Union, and when and under what circumstances?

The Witness: Well, I'm not sure whether we handed it to Claude personally, or whether we sent it by mail.

Mr. Davis: Do you have any recollection at all of having transmitted it to the Union in any way?

The Witness: Oh, yes, we made up this last list, I am quite sure, after one of our final discussions.

Mr. Davis: You made the list up?

The Witness: No, I am not positive, Mr. Davis, as to whether we sent a separate letter with it or not.

Mr. Davis: Well, are you positive as to whether you sent it?

The Witness: Oh, positive.

Mr. Davis: In what way did you send it, did you send it——

The Witness: By mail, I am quite sure.

Trial Examiner Bennett: Do you have a practice of sending a list with a covering letter?

The Witness: Usually, yes; we usually put it in the form these other letters are put in.

Mr. Davis: And these other letters include the names of the people right in the body of the letter, don't they; isn't that your usual practice?

The Witness: That is the usual practice, yes, yes.

Mr. Davis: We will object to this offer as not—having no proper foundation, no proper foundation having been laid, no proper identification.

(Testimony of Francis A. Tissier.)

The Witness: Well, I will have to check up on that, Mr. Davis, to be sure whether it was actually sent by mail or——

Trial Examiner Bennett: As I understand your testimony now, you are not sure whether you mailed it or handed it personally to a Union representative, is that correct?

The Witness: That I am not positive of. I will have to check in on this.

Trial Examiner Bennett: I will reserve ruling on No. 11 temporarily. [26]

The Witness: As a rule, we send the letter, embodied right in the letter.

Q. (By Mr. Magor): All right, Mr. Tissier. You started to tell us about your first meeting with the Union, and you told us who was present, on November 10th, 1954. Was any proposal given by the Association, as well as Local 648, for a new contract on that date?

A. Yes, we exchanged proposals. The Union presented these proposed amendments and I see we have a revised section added to it as of January the 1st, but this was presented to us by the Union on November the 10th.

Q. Will you tell me which one was first presented?

A. Well, that is the Union's, this portion of it here. It's—Let's take this top part off. And here's the one we presented to them, if you want both of them at the same time, to save time.

Q. And——

(Testimony of Francis A. Tissier.)

A. And this subsequent Amendment was presented to us on January the 7th at a meeting.

Trial Examiner Bennett: Do you propose to——

Mr. Magor: We will go into that later, Mr. Tissier.

The Witness: Oh.

Trial Examiner Bennett: Do you propose to develop the full bargaining history?

Mr. Magor: Develop the full bargaining history?

Trial Examiner Bennett: For the new contract?

The Witness: Hope not.

Mr. Magor: No, no, I certainly don't.

Trial Examiner Bennett: I was going to say, I don't see where it would be necessary.

Mr. Magor: I just intended to show where is the dispute, and I'm certainly apprised of what's the best evidence, and these parties seem to put everything they do, practically, in writing.

Trial Examiner Bennett: The thought occurred to me, if the parties are in agreement it might well lend itself to a stipulation that they met on certain dates, and they were in disagreement on certain topics, and a strike then ensued. If there is no conflict of facts, I believe it would lend itself to a stipulation.

Mr. Davis: I have already suggested that to Counsel. I certainly would be opposed to this course that he is now following, of taking up each meeting and each document that was communicated between the parties. This went on over a period of

(Testimony of Francis A. Tissier.)

three months—What was it, eighteen, nineteen, twenty meetings?

Mr. Magor: I don't intend to.

Q. (By Mr. Magor): I show you what I have marked for identification purposes as General Counsel's Exhibits 12 and 13.

Mr. Magor: I formally offer them into evidence.

Trial Examiner Bennett: Any objection?

Mr. Davis: No objection.

Trial Examiner Bennett: They may be received.

(Thereupon the documents above referred to were marked General Counsel's Exhibits Nos. 12 and 13 for identification and received in evidence.)

Trial Examiner Bennett: No. 12 is the proposed Amendments by the Union; No. 13 the proposed Agreement by the Employers' Association.

Q. (By Mr. Magor): Was any agreement reached for a new contract at your first meeting, Mr. Tissier? A. No.

Q. Now, how many meetings did you hold after that?

A. Twelve more meetings after the first one.

Q. And, directing your attention to the meeting of December 14th, was any letter furnished the Union with respect to Purity and Lucky Stores?

A. December 14th? Was that the second meeting?

Q. Strike that. December 10th.

A. December the 10th—1954—present representing—the meeting was held in my office at ten a.m.

(Testimony of Francis A. Tissier.)

on December the 10th, at which time the Union was represented by Mr. Jinkerson, Mr. Davis, Mr. Vail, Mr. Hartshorn, Mr. Hunter, and Mr. Lyons, and the Industry was represented by Mr. E. R. Hoerchner and myself, F. A. Tissier, and Mr. Ted [29] Lyman, L-y-m-a-n, and Mr. Fred Schoeneman, S-c-h-o-e-n-e-m-a-n.

Trial Examiner Bennett: Counsel asked if on that occasion you presented the Union with letters relating to Purity and Lucky's.

The Witness: Yes, that's the reason I wanted to refresh my mind as to who was present, and I will give you copies of their letters, which were satisfactory to the Union. This is a copy of a letter I received from Mr. Niven, advising me of the situation, and that was the one that they sent to the Union. Did you want both of them at the same time, Mr. Schoeneman's, too?

Mr. Magor: Yes.

The Witness: I'd like, of course, to keep those copies, these two.

Mr. Magor: Well, we will see if we can arrange that, sir.

The Witness: Yes.

Mr. Magor: What is the next in order?

Trial Examiner Bennett: 14.

Mr. Magor: I have marked for identification purposes as General Counsel's Exhibit 14, a letter, copy of a letter dated December 9, 1954, to the Retail Grocers Association, and signed by Frederick J. Schoeneman; a copy of a letter dated December

(Testimony of Francis A. Tissier.)

8th, 1954, to Grocery Clerks Union Local 648, by J. R. Niven, Chief Executive Officer. [30]

I formally offer them into evidence.

Mr. Davis: No objection.

Trial Examiner Bennett: They may be received.

(Thereupon the documents above referred to were marked General Counsel's Exhibits Nos. 14 and 15 for identification and received in evidence.)

Q. (By Mr. Magor): You have told us who everybody was at that meeting, Mr. Tissier, except Mr. Niven and Mr. Schoeneman. Who did they represent?

A. Oh, Mr. Lyman represented Purity Stores, and Mr. Schoeneman represented Lucky Stores.

Q. Was any agreement reached at that meeting of December 10th, 1954? A. No.

Q. What were the principal issues that were in dispute at that time?

Mr. Davis: I am going to object to that on the ground it is not going to any issue in the Complaint, incompetent, irrelevant and immaterial. We are getting into the issues of the dispute.

Trial Examiner Bennett: I will take his answer as to whether or not they arrived at an agreement.

The Witness: No, they arrived at no agreement.

Q. (By Mr. Magor): Did you receive any letter from the San Francisco Labor Council? [31]

A. Are you going to ask for that, too? Yes, I have a copy here of a letter that I received from the Labor Council on January the 6th, 1955.

(Testimony of Francis A. Tissier.)

Trial Examiner Bennett: Before we get into that, I would like to ask you with reference to these letters from the officers of Lucky and Purity, had you previously bargained for those two chains?

The Witness: Well, they——

Trial Examiner Bennett: In any way?

The Witness: Well, they came in on our second meeting, and the Union objected to anyone sitting in as our representatives who we did not represent by Powers-of-Attorney.

Trial Examiner Bennett: By "second meeting," you are referring to your second meeting in this 1954 series of meetings?

The Witness: Yes.

Trial Examiner Bennett: Prior to that, in prior years, had you bargained for them in any way?

The Witness: Oh, they always sat in our meetings.

Trial Examiner Bennett: Did they negotiate separate contracts or what?

The Witness: No, no. they always accepted the industry contract. Prior to this last meeting we held—prior to the 1955 contract—that is this one—we held Power-of-Attorney with Purity, and they withdrew it for this year's contract; and prior to the 1950 contract we held Power-of-Attorney for Lucky Stores, for a number of years. I don't recall how many years.

Trial Examiner Bennett: Well, with reference to that 1950 contract, which I asked about before,

(Testimony of Francis A. Tissier.)

do I understand that you held a Power-of-Attorney for one or the other of the two chains?

The Witness: Both of them, on that particular 1950 contract.

Trial Examiner Bennett: And you bargained for them on that occasion?

The Witness: Yes.

Q. (By Mr. Magor): You say you did receive a letter from the San Francisco Labor Council?

A. Yes. Did I give you the copy? There is a copy of the letter I received from Mr. Johns, Secretary. Here is the original. Of course, I'd like to keep that.

Mr. Magor: I will show it to Mr. Davis.

What is the next one?

Trial Examiner Bennett: 16.

Mr. Magor: I mark for identification purposes as General Counsel's Exhibit 16 a copy of a letter dated January 6th, 1955, to F. A. Tissier, Secretary, from George W. Johns, Secretary, San Francisco Labor Council, and I take it there is no objection to my withdrawing the original and substituting [33] a copy of it?

Mr. Davis: No objection.

Mr. Magor: I formally offer it into evidence.

Trial Examiner Bennett: Any objection to its receipt?

Mr. Davis: No objection.

Trial Examiner Bennett: It may be received.

(Thereupon the document above referred to

(Testimony of Francis A. Tissier.)

was marked General Counsel's Exhibit No. 16 for identification and received in evidence.)

Q. (By Mr. Magor): After receipt of that letter from the San Francisco Labor Council, did you meet further with the Labor Council or Local 648?

A. We met on January the 17th, at 2:00 p.m.

Q. And where did you meet, sir?

A. In my office.

Q. Who was present at that meeting?

A. Labor Council representatives were Mr. George Johns, Mr. Jack Goldberger, Mr. Wendell Phillips, P-h-i-l-l-i-p-s, and the Union, Local 648, was represented by Mr. Davis, Mr. Jinkerson, Mr. Hartshorn, Mr. Hunter, Mr. Lyons and Mr. Vail; and the Industry was represented by Mr. Hoerchner, Mr. Schoeneman, Mr. Lyman and myself, Tissier.

Q. Was any agreement reached at that meeting for a new contract?

A. No, there was nothing definite reached [34] at that—we discussed a number of things, and adjourned the meeting until January the 20th.

Q. And was a meeting held January the 20th?

A. Yes; the same representatives from the Labor Council, Mr. Jinkerson, Mr. Davis, Mr. Hartshorn, Mr. Hunter and Mr. Lyons represented the Union, Local 648, and Mr. Schoeneman, Mr. Lyman, Mr. Hoerchner and myself represented the Industry.

Q. Was any agreement reached at that meeting?

A. No. We had received a proposal from the

(Testimony of Francis A. Tissier.)

Labor Council, which we were to present to our Labor Relations Committee, and a further meeting was held on January the 25th, with just the Labor Council Committee. Do you want the results of that?

Q. Where was that held, sir?

A. My office. All of these meetings were held at my office.

Q. All right. Who was present at this meeting of January 25?

A. Representing the Labor Council, Mr. Jack Goldberger—Is that the way you pronounce it?—Mr. Johns, Mr. Wendell Phillips. The Industry was represented by Mr. Hoerchner, Mr. Schoeneman, Mr. Lyman and myself.

Q. Was any agreement reached at that meeting?

A. No, that was the last meeting held.

Q. Tell us what occurred at that meeting.

A. Well, after we discussed and came back to them with a proposal that we were—our committee had instructed us to [35] hand to the Union, they stated, when they wound up, that all recommended deals are now withdrawn, and so forth and so on. Our final proposal was for arbitration. We also told the Labor Council Committee that a strike against one of our members was a strike against all of our members. That was the way the meeting broke up. We did ask them if we could have a few days' notice as to when the Clerks were going to strike, but of course that was something beyond them.

Q. What was said by any representative of the

(Testimony of Francis A. Tissier.)

Labor Council when you said a strike against one is a strike against all?

A. Well, they understood that we always had that position.

Mr. Davis: I will move to strike that answer.

Mr. Magor: It may go out.

Mr. Davis: Non-responsive.

Trial Examiner Bennett: Motion granted.

Q. (By Mr. Magor): Tell us what was said and by whom was it said.

A. Well, Mr. Wendell Phillips said, in getting up, ready to leave, that we're going to deal with the Independent Grocers Association of Northern California; we'll make a deal with them and you'll get a worse deal than we have offered to you. Of course, we very smilingly said, yes, we will see about that.

Trial Examiner Bennett: What is the Independent Grocers Association of Northern California?

The Witness: What are they? [36]

Trial Examiner Bennett: Yes, if you know.

The Witness: Well, I don't know much about them. They are supposed to be an organization started by some gentlemen up on Market Street.

Trial Examiner Bennett: I am interested in just a rough characterization of them. Are they a trade association in this area or not?

The Witness: I haven't heard of them doing any trade association work yet. I am not familiar with their workings; whether they are in operation or not, I haven't the slightest idea.

(Testimony of Francis A. Tissier.)

Trial Examiner Bennett: Next question.

Q. (By Mr. Magor): What occurred after this meeting, Mr. Tissier, can you tell us, and can you tell us when it occurred?

A. Well, on February the 3rd, somewhere between 8:30 and 9:00 o'clock, we received word that two of our stores were picketed.

Q. Which stores were they?

A. One of them called the City Super Market, out on Geary Boulevard, and the other was the Grocery Department of Rossi's Market, over on Vallejo.

Trial Examiner Bennett: Rossi's Market, on Vallejo?

The Witness: Yes, the Grocery Department.

Q. (By Mr. Magor): What did you do after that, sir?

A. Well, as soon as we heard, we wanted to verify the fact, [37] because we had already instructed our membership as to the procedure to be followed, and we had—as I recall, three of our members, to be sure, to check it, check that there actually were pickets there. We didn't want somebody's word that somebody was being picketed. So we had some more committeemen to check up, see that there were actually pickets there, and when we were advised that there were, we immediately got out a special delivery letter to our members, in which we enclosed a letter to be handed to our grocery clerks that evening, advising them that they were being laid off for the period of the dispute.

(Testimony of Francis A. Tissier.)

Q. Do you have those letters with you, sir?

A. Yes. There is one of each, to our members, and one to the Union.

Mr. Magor: What is the next one——

The Witness: We supplied each member with a sufficient number, that would cover all the clerks employed in the store.

Q. (By Mr. Magor): I show you a letter marked for identification purposes as General Counsel's Exhibit 17, entitled, "A Letter to our Food Clerks," and ask you if you can identify that.

A. Yes, this is the letter we sent to our members, for distribution to their employees.

Q. I show you a letter dated February 3, 1955, or copy thereof, marked for identification as General Counsel's [38] Exhibit 18, entitled, "To All Employing Members," and I ask you sir, if you can identify that?

A. That's correct, we sent that out the morning of February the 3rd by special delivery.

Q. And it refers to all employing members; who are those, who were they?

A. All of those that we held Powers-of-Attorney for.

Mr. Magor: I formally offer them into evidence, General Counsel's Exhibits 17 and 18.

Mr. Davis: I don't think it has any materiality to any issues set forth in the Complaint, or raised by the Complaint, but I will waive objection.

Trial Examiner Bennett: They may be received.

(Thereupon the documents above referred to

(Testimony of Francis A. Tissier.)

were marked General Counsel's Exhibits Nos. 17 and 18 for identification and received in evidence.)

Trial Examiner Bennett: We will take a five minute recess at this point.

(Short recess.)

Trial Examiner Bennett: On the record.

Q. (By Mr. Magor): Mr. Tissier, what occurred after these letters were sent out to all your employing members, if anything?

A. How do you mean was the strike on?

Q. Yes, what happened after you sent those letters out to [39] all your employing members; what was done by your members, if anything?

A. Well, I haven't the actual check-up on the number of stores that laid their employees off, their clerks off that night. Maybe I could get that from the Union, but I do know that many of them laid their clerks off, hundreds of them. I think we had a figure at one time of seven hundred and some-odd clerks, beyond seven hundred clerks that were actually laid off.

Q. Was any meeting held after that with a Federal Mediator?

A. On February the 22nd, in the afternoon, February 22nd, a meeting was held with George Hillebrandt, Conciliation Department. He is the United States Conciliation man.

Q. Was any agreement reached at that meeting?

A. No. He explored, tried to bring the two

(Testimony of Francis A. Tissier.)

groups together, and made quite a number of suggestions.

Q. Were representatives of both the Association and the Union present?

A. No, at that meeting it was entirely a meeting of the Labor Council Committee, at which Mr. Phillips, Mr. Goldberger, and Mr. George Johns were present, with Mr. Hillebrandt, and the representatives of the Industry were Mr. Hoerchner, Mr. Fred Schoeneman, Mr. Lyman and myself. We met up in the office of the United States Conciliation Department.

Q. Was any agreement reached and signed [40] between the Association—When I refer to the "Association" I refer to the Grocers Association—and Local 648; did you sign a contract?

A. You mean the final outcome?

Q. Yes.

A. Yes, we signed a contract on——

Q. Just tell us the date it was signed.

A. Well, let's see, the 18th day of March, 1955, final contract was signed.

Q. Do you have Powers-of-Attorney, the Power-of-Attorney of Max Ostrow's Delicatessen, at 1175 Market?

A. Wait a minute, I think I have got that whole list that you were referring to. There's Long's, Standard Groceteria, Pay'n Takit——

Mr. Davis: I will move that answer be stricken as not responsive.

Mr. Magor: It may go out.

(Testimony of Francis A. Tissier.)

Trial Examiner Bennett: Granted.

The Witness: I am referring to that list.

Q. (By Mr. Magor): I just asked you about Max Ostrow.

A. Yes, yes, we had Max Ostrow's Power-of-Attorney. Want the day it was signed?

Q. Give us the date of it.

A. April the 11th, 1950, one of them was signed, and a new one was signed on the 1st of January, 1955. We have two copies [41] here in the file.

Q. How about Fred Holzer, Louie's Delicatessen, 1175 Market Street?

A. Fred Holzer's Power-of-Attorney, signed December the 11th, 1954.

Q. How about the Power-of-Attorney for J. M. Long and Company, Inc., 1175 Market Street?

A. J. M. Long, we have a Power-of-Attorney signed January the 16th, 1952, by Mr. Haag, I think is the name, Vice-President,——

Q. How about Standard Groceteria, Inc., at 1175 Market Street? Give us the date of the Power-of-Attorney from them.

A. We have an old one, signed on the 20th of January, 1948, and the new one was signed the 14th of January, '55. When I say "the new one," we changed it slightly, changed the form of the wording in the old one over the new one.

Q. Do you have a Power of Attorney for Pay'n Takit?

Trial Examiner Bennett: What's that?

Mr. Magor: P-a-y-'-n T-a-k-i-t, 1175 Market.

(Testimony of Francis A. Tissier.)

The Witness: We have three Powers-of-Attorney, signed by Morris De Lanis of Pay'n Takit, one on June the 6th, 1949, another one of January the 2nd, 1954, and another one dated January the 1st, 1955.

Q. (By Mr. Magor): Do you have one from Italian Importing Company? [42]

A. We have one from the Italian Importing Company, signed by Joe-somebody on——dated December 15, 1952.

Trial Examiner Bennett: Was there an address?

Mr. Magor: 1175 Market Street.

The Witness: 1175 Market Street. All of these that I am naming here are 1175 Market Street.

Q. (By Mr. Magor): Now, how about one from Freese Delicatessen, at 1175 Market Street?

A. Yes, we have one under date of April the 11th, 1950, and the second one as of April the 19th, 1954.

Trial Examiner Bennett: There is one thing I would like to see cleared up. I don't care whether you do it with this witness or another witness. I am under the impression that this Association represents only retail grocers as contrasted with retail fruit and vegetable dealers.

Mr. Magor: That is correct.

The Witness: That is correct.

Trial Examiner Bennett: Is that correct?

The Witness: We have nothing to do with the fruit and vegetable dealers. It's a separate trade organization.

(Testimony of Francis A. Tissier.)

Trial Examiner Bennett: All right. That takes care of that.

Mr. Magor: You may examine.

Cross Examination

Q. (By Mr. Davis): Mr. Tissier, may I [43] see the Powers-of-Attorney for Mr. Max Ostrow and Fred Holzer?

A. Yes, here you are. Start at the back row, you will find the first one there.

Trial Examiner Bennett: I would like to ask the General Counsel this: Do you propose to get into the record the dimensions or layout of the premises at 1175 Market?

Mr. Magor: I do.

Q. (By Mr. Davis): Were your offices open for business on January 1st, 1955, Mr. Tissier?

A. We're open for business—the Trade Association—not only Sundays and every other day—whenever we are called upon, we go down to the office and take care of it, anything.

Q. Did you do that on January 1st, 1955?

A. Undoubtedly we did, when we checked this particular name in here, January the 1st.

Q. I show you what purports to be a Power-of-Attorney of Max Ostrow, with a date on there, 1/1/55. Will you describe the circumstances under which you received that Power-of-Attorney?

A. That's possible that this one was mailed in, because we have the original one, which holds, is good until it is cancelled anyway, so it is immaterial.

(Testimony of Francis A. Tissier.)

Q. You don't recall? A. No.

Q. Now, I also—— [44]

Trial Examiner Bennett: You don't recall the circumstances of a later one?

The Witness: No, we mailed these all out, and asked them to file new ones. We do that periodically, and we date them.

Trial Examiner Bennett: You customarily get those in the mail?

The Witness: Yes.

Q. (By Mr. Davis): Well, did you date that Power-of-Attorney?

A. Undoubtedly, Mr. Davis,—it seems to be Max Ostrow's handwriting and his own signature.

Q. So you didn't date that?

A. No, I didn't date this, no.

Q. I also hand you what purports to be the Power-of-Attorney of Mr. Fred Holzer. Was the date on there, of December 31st, 1954,—Can you recall the circumstances under which you received that Power-of-Attorney?

A. Well, our Field Secretary either picks them up, or they come in by mail.

Q. Do you recall?

A. Well, I don't open all the mail, Mr. Davis.

Q. You can answer that yes or no, can't you?

A. No, I can't say that I received it—whether I received it by mail or whether our Field Secretary picked it up. [45]

Q. Now, do you know who put that date on it?

A. Well, I don't profess to know Mr. Fred Hol-

(Testimony of Francis A. Tissier.)

zer's signature. You take it for granted that that is his signature.

Q. I didn't ask you about that, Mr. Tissier; do you know who put the date on it? A. No.

Q. Did you advise the Union of the receipt of these Powers-of-Attorney, those two I have been asking you about?

A. I am sure at one of our meetings I told Claude we had a number of additions that we hadn't sent over yet.

Q. Did you advise him of these two, Mr. Tissier, specifically?

A. I didn't think it was necessary to advise him. I am quite sure I would.

Q. Did you or didn't you, Mr. Tissier?

A. No, I can't recall on those two in particular, no.

Q. You sent the Union letters beginning with November the 15th, 1954, through January 11th, 1955, which I believe are General Counsel's Series 10 exhibits. In none of those letters did you specify you had received Powers-of-Attorney from Mr. Ostrow or Mr. Holzer, did you?

A. I presume if you have got the letters there, we didn't.

Q. Mr. Ostrow's and Mr. Holzer's names do not appear on the original list of Powers-of-Attorney that you furnished the Union on November 10th, 1954, do they? [46]

A. I am just looking it up to see if they do.

(Testimony of Francis A. Tissier.)

I see no reason why they shouldn't have been on there. We still had his Power-of-Attorney.

Trial Examiner Bennett: Let me ask you this: Had you previously entered into any contracts in behalf of Ostrow or Holzer?

The Witness: Yes, he was bound by the 1950 contract.

Trial Examiner Bennett: Both of them?

The Witness: Yes.

Q. (By Mr. Davis): Well, do you have the Power-of-Attorney from Mr. Holzer or Mr. Ostrow that binds them, binds those gentlemen to any previous contract with Local 648?

A. Yes, here's this one, signed in 1950, that binds them; so does that one.

Q. And did Mr. Ostrow continue as a member of your Association?

A. Yes, he was in all due respects a member of the Association.

Q. Did you furnish the Union a list of Powers-of-Attorney in your negotiations in 1954—'53—I'm sorry.

A. Every year we furnish them a list, yes.

Q. Did Mr. Ostrow or Mr. Holzer's name appear on that list of Powers-of-Attorney?

A. Well, I don't happen to have it here, so I can't answer that question, don't have that list. [47]

Q. The fact of the matter is, Mr. Tissier, that you didn't represent either of those gentlemen in negotiations in 1954 with the Union, did you?

(Testimony of Francis A. Tissier.)

A. I am quite sure we represented Ostrow in the 1954—or, '53-'54 negotiations, yes.

Trial Examiner Bennett: Counsel is asking whether you represented them in 1954.

The Witness: It's possible that their names went out, but on that original list I don't see the name.

Trial Examiner Bennett: Irrespective whether they are on the list or not, did you bargain in their behalf? That is the issue.

The Witness: I am under the impression we did, because we had their original Powers-of-Attorney, which were never cancelled to my knowledge. It would have had the word "Cancelled" on here, had it been cancelled, so undoubtedly we were bargaining in good faith for Mr. Ostrow.

Q. (By Mr. Davis): Now, in that connection, Mr. Tissier, at the first meeting you have testified about—I think the date was November 10, 1954—it is a fact, is it not, that the Union asked you to supply it with the names of all of your members who you represented in negotiations?

A. They did.

Q. And you thereafter did that, is that correct?

A. That's correct. [48]

Q. And Mr. Ostrow and Mr. Holzer's name did not appear on any of those lists, isn't that a fact?

A. Well, I—that's possible.

Mr. Magor: I object to that on the grounds the documents speak for themselves.

Trial Examiner Bennett: I will take the answer.

The Witness: Who was the other name, Ostrow, and who was the other one?

(Testimony of Francis A. Tissier.)

Q. (By Mr. Davis): Holzer.

A. Holzer? Is his name on here?

Trial Examiner Bennett: I am looking through these exhibits——

The Witness: I don't see either one of their names on here.

Trial Examiner Bennett: I am looking through these exhibits myself. Perhaps Counsel could enlighten me, are these people, Holzer and Ostrow, respectively, under a different name?

Mr. Davis: It's Ostrow's Delicatessen, 1175 Market Street, and Louie's Delicatessen, 1175 Market Street, otherwise known as the Crystal Palace Market.

Mr. Magor: GC-11, the last two.

Mr. Davis: Yes, their names appear, Mr. Examiner, on a document that Counsel offered, which is not yet in evidence, purporting to be a list furnished to the Union on March 29, [49] 1955. I think it is identified as 11, is that it, Counsel?

Mr. Magor: That's right.

Trial Examiner Bennett: That is the one on which I reserved ruling?

Mr. Davis: Yes, yes.

Q. (By Mr. Davis): Now, Mr. Tissier, I think you have testified earlier in response to one of counsel's questions, that you had approximately 500 members of your Association. Was that the number that you had when these negotiations commenced with Local 648, in November of 1954?

A. Approximately that number.

(Testimony of Francis A. Tissier.)

Trial Examiner Bennett: You said before that Ostrow and Holzer were bound by the previous five-year contracts, is that correct?

The Witness: That's correct.

Trial Examiner Bennett: Did they ever subsequently take the position with you that you were not authorized to bargain in their behalf?

The Witness: No. If they had, we would have cancelled out the Power-of Attorney and would not have had it in our possession.

Mr. Davis: May I see those.

The Witness: There's no cancellation on that at all.

Q. (By Mr. Davis): How about Holzer?

A. I don't recall Holzer having one prior to this. [50]

Q. You mean prior—and "prior to this" is prior to December 31st, 1954?

A. Yes, prior to 1954. No, I don't recall.

Q. It is prior to December 31st, 1954, is that right? A. Yes.

Trial Examiner Bennett: How is that, he is bound by the earlier five-year contract?

The Witness: I am not speaking of him, I am speaking of Ostrow.

Trial Examiner Bennett: How about Holzer?

The Witness: No, unless we have a previous Power-of-Attorney, I wouldn't say he was bound, except by the present contract.

Q. (By Mr. Davis): Now, you stated that you had approximately 500 members at the time nego-

(Testimony of Francis A. Tissier.)

tiations commenced. You did not, however, represent all of those members in negotiations, did you, with the Union?

A. Well, no, there are some of those that don't hire any help.

Q. Approximately how many did you represent in negotiations, how many of your members in negotiations with Local 648 in the fall of '54 and the early winter of '55?

A. Well, approximately 300 — 275 to 300 members, who operated about 360 stores, individual stores.

Q. Now, in order to be represented by you in negotiations [51] with the Union, a member of your Association must give you a written Power-of-Attorney, giving you that authority, isn't that right, Mr. Tissier? A. That's correct, yes.

Q. Now, when you said that there were hundreds of members laid off, you were referring to Union members, were you not?

A. Grocery clerks, yes, members of 648.

Q. Approximately how many of your members, members of your Association engaged in this practice of laying off their clerks, that you described?

A. I can't offhand state how many exactly laid off their clerks, except the number of clerks—our check-up showed seven hundred and some-odd were actually laid off.

Q. Did Ostrow's Delicatessen lay off its clerks?

A. I understand he did.

Q. When?

(Testimony of Francis A. Tissier.)

A. That I am not prepared to say; might have laid them off the first day or second day or third day, because many of those people were not bothered the first day or so.

Q. Did Fred Holzer of Louie's Delicatessen lay off his clerks?

A. I haven't the slightest idea whether he did it the first or second day or later.

Q. Morris De Lanis of Pay'n Takit, 1175 Market, lay off his clerks? [52]

A. I can't say definitely whether he did or not. I understood he did, but I didn't go checking them up.

Q. Did George Freese, of Freese's Delicatessen, 1175 Market Street, lay off his clerks?

A. I think he so reported at one of the meetings, that he did.

Q. Did J. M. Long and Company lay off its grocery clerks?

A. I have his word that he did, at several of our meetings.

Q. Did Standard Groceteria, operated by N. Narin, at 1175 Market, lay off its clerks, grocery clerks? A. He said he did.

Q. Do you know when in any of these cases, and how many?

A. Long and Company and Nate Marin—they told us they laid them off the night of the 3rd of February. Freese the same way. I think he said he laid his off the 3rd of February.

Mr. Davis: I have nothing further.

(Testimony of Francis A. Tissier.)

Mr. Magor: Could I have the Power-of-Attorney for Mr. Ostrow?

The Witness: Yes.

Redirect Examination

Q. (By Mr. Magor): I direct your attention to one dated 4-11-50, and the third paragraph thereof.

"I further agree that during the term hereof I will not sign any agreement respecting terms and conditions of employment until same has been approved in writing with the Retail [53] Grocers Association of San Francisco. This agreement and authorization shall continue until cancelled in writing, signed by undersigned and delivered to Retail Grocers Association of San Francisco at its office in San Francisco."

I ask you, sir, if you ever received any cancellation in writing? A. Never did.

Mr. Magor: No further questions.

Recross Examination

Q. (By Mr. Davis): Do your members pay dues, Mr. Tissier, to your Association?

A. Well, some of them get behind. They do pay dues, yes.

Q. When they get behind, do you take any action?

A. We try to collect from them, naturally.

Q. Do you continue to represent them when they haven't paid dues?

A. On labor relations?

Q. Yes.

(Testimony of Francis A. Tissier.)

A. We hold them to the Power-of-Attorney and make them pay up their dues, until they get ready to resign.

Q. Mr. Ostrow pay his dues since 1950?

A. I am quite sure he did, or his name would have been taken out of the files.

Q. Well, we have seen, Mr. Tissier, that his name was not on the list of Powers-of-Attorney furnished the Union. Could [54] that be because he hadn't paid his dues?

A. That's possible, that's possible.

Mr. Davis: That's all.

The Witness: That's possible.

Further Redirect Examination

Q. (By Mr. Magor): On November the 10th, 1954, did the Union representatives inspect the Powers-of-Attorney in your office?

A. They checked every one of them, yes.

Mr. Magor: That's all.

Further Recross Examination

Q. (By Mr. Davis): What did they check, Mr. Tissier? A. All those names.

Q. The names, the lists of names that you furnished them? A. That we presented, yes.

Q. Which is General Counsel's Exhibit 9?

A. Four hundred and some-odd names.

Q. And they checked the names on this list against your files, to see if there were Powers-of-Attorney?

(Testimony of Francis A. Tissier.)

A. That we actually had Powers-of-Attorney, yes.

Mr. Davis: That's all.

Trial Examiner Bennett: Did they check every one?

The Witness: Oh, yes.

Q. (By Mr. Davis): Every name on the list they checked? A. Every name on the list.

Mr. Magor: I have nothing further of the witness.

Mr. Davis: I have nothing further.

Trial Examiner Bennett: You are excused.

The Witness: Thank you.

Trial Examiner Bennett: One point that occurs to me with reference to this Sub-paragraph (c) of Paragraph One of the Complaint, and I am referring to the dollar and cents figure you referred to therein. This witness has testified that they don't bargain in behalf of those members who do not have employees, or at least I so construed his testimony. I was just wondering whether or not that would have any effect on the dollar and cents figure in that paragraph. Conceivably, you might clarify that.

The Witness: Just a moment. Let me get that clear. We have Powers-of-Attorney signed by some of our members who hire no help, but they are bound by that, if they do hire help—it is always explained to them if you hire any help, you have to live under this contract, because otherwise there'd be no point in having them sign the contract or sign

(Testimony of Francis A. Tissier.)

the Power-of-Attorney. Sometimes they may, during the year, want to go away on vacation, they may want to hire somebody; therefore, they have got to be bound by the terms of our contract.

Q. (By Mr. Davis): But you don't bargain for any of your members that don't give you Powers-of-Attorney? A. Oh, no. [56]

Trial Examiner Bennett: That's all at this time.

(Witness excused.)

Trial Examiner Bennett: We will recess until 1:30.

(Whereupon a recess was taken until 1:30 o'clock p.m.) [57]

After Recess

(Whereupon the hearing was resumed, pursuant to the taking of the recess, at 1:30 o'clock, p.m.)

Trial Examiner Bennett: On the record.

Mr. Magor: Mr. Haag, will you take the stand, please?

SIDNEY A. HAAG

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Magor): Will you state your name and address for the record, please?

A. Sidney A. Haag, H-a-a-g, 1525 Gibbons, G-i-b-b-o-n-s, Alameda.

(Testimony of Sidney A. Haag.)

Q. What is your business or occupation, Mr. Haag?

A. I am the General Manager and Vice-President of J. M. Long and Company, Inc., who operate the Crystal Palace Market.

Q. Where is the Crystal Palace Market located?

A. At 8th and Market in San Francisco.

Q. How long have you held the position you have with J. M. Long and Company?

A. Approximately eleven years.

Q. What operations are there in the Crystal Palace Market?

A. You mean the various types?

Q. That's right.

A. Grocery departments, delicatessen departments, creameries, [58] bakeries, liquor departments, shoe repair, locksmith, restaurants, two cocktail bars. I think that's just about all of them.

Q. What operations does J. M. Long and Company have in the Crystal Palace Market?

A. J. M. Long operates two liquor and tobacco departments, a grocery store, and an appliance store.

Q. Are there any other grocery stores in the Crystal Palace Market?

A. There is one other.

Q. What is the name of that?

A. Standard Groceteria.

Trial Examiner Bennett: Long's operate a liquor, tobacco, grocery and appliance?

The Witness: That is right.

(Testimony of Sidney A. Haag.)

Trial Examiner Bennett: These are four separate sections or what?

The Witness: Well now, there are two—there's a liquor and tobacco department in the Market Street entrance, there's still another liquor and tobacco department at the southern end of the building, on 8th Street.

Trial Examiner Bennett: There are two liquor and tobacco departments?

The Witness: That is right.

Trial Examiner Bennett: A separate grocery store [59] department and a separate appliance department?

The Witness: That is right.

Q. (By Mr. Magor): Are these departments leased by the various operators in the Crystal Palace Market? A. They are.

Trial Examiner Bennett: Those other than the four Long's operate?

The Witness: Other than the four that Long's operate, that is right.

Q. (By Mr. Magor): And from whom are they leased? A. From J. M. Long and Company.

Q. Is there an operation known as Pay'n Takit in the Crystal Palace Market?

A. Yes, that is a bulk foods department.

Trial Examiner Bennett: A what?

The Witness: Bulk Foods.

Trial Examiner Bennett: What do you mean by bulk foods?

The Witness: Pardon me? Bulk foods — well,

like the old-fashioned grocery store, where the beans are in the sacks and the prunes are in the boxes; in other words, it's not a package department, it's bulk foods.

Q. (By Mr. Magor): Who operates Pay'n Takit? A. A man named De Lanis.

Q. Will you spell his name for the Reporter, please? A. D-e L-a-n-i-s. [60]

Q. Is there an Italian Importing Company operating in a department in the Crystal Palace Market?

A. Yes, there is an Italian Delicatessen, owned by Joseph Damonte, D-a-m-o-n-t-e.

Q. Is there a Freese Delicatessen in the Crystal Palace Market?

A. That's another delicatessen, owned by George and Anna Freese.

Trial Examiner Bennett: How many leases in all are there in this Crystal Palace Market?

The Witness: Oh, approximately sixty-four.

Q. (By Mr. Magor): Is there an Ostrow's Delicatessen in the Crystal Palace Market.

A. Yes. At that time it was operated by Max Ostrow.

Q. What time are you referring to?

A. The period from—well, let's say up until April 1st, 1955.

Q. Is there a Louie's Creamery in the Crystal Palace Market?

A. Yes, that's a creamery operated by Fred Holzer, H-o-l-z-e-r.

Q. And are all the various companies that you

(Testimony of Sidney A. Haag.)

have just identified as being operated in the Crystal Palace Market—were they operating in February, 1955? A. They were.

Q. Were they tenants of J. M. Long and Company, Inc.? [61] A. They were.

Q. Your company has given a Power-of-Attorney to the Grocers Association to represent you in collective bargaining, have you not? A. We have.

Q. Is that for your grocery store?

A. For the grocery store only.

Trial Examiner Bennett: Does Long own or lease the building?

The Witness: We own the grounds and building.

Q. (By Mr. Magor): Do you know a Donald Z. Donabedian?

A. Yes, he operates a fruit and vegetable department known as DZD.

Q. Do you know a Warren Gummow?

A. Yes, he operates a fruit department known as Gummow's.

Q. Do you know Rose Misuraca?

A. Yes, she operates a fruit department—I am sure, pretty sure—I think it's Rose Ann.

Q. Do you know William Mastarona?

A. Don't know that name.

Q. Well, there is a department known as Peninsula Fruit in the Crystal Palace Market?

A. That's Martarano.

Q. How do you spell that name?

A. M-a-r-t-a-r-a-n-o. [62]

(Testimony of Sidney A. Haag.)

Q. Is there a Nu-Way Produce in the Crystal Palace Market?

A. Yes, that is operated by Peter Giannini.

Q. And during the month of February, 1955, were those operators—those departments operating in the Crystal Palace Market? A. They were.

Q. And they are also tenants of J. M. Long and Company, Inc.? A. They are.

Q. And they lease their departments from J. M. Long Company, Inc.? A. That is right.

Trial Examiner Bennett: Is that the correct name, J. M. Long and Company, Inc.?

The Witness: That is correct.

Trial Examiner Bennett: Is that a corporation?

The Witness: That's right.

Q. (By Mr. Magor): I show you, Mr. Haag, an apparent diagram of something marked for identification purposes as General Counsel's Exhibit 19. I ask you to look at that, sir, and tell us what that is.

A. Well, that is a map that generally delineates the entire market, and in fact delineates the entire property. It first appeared as such on our Thirtieth Anniversary Newspaper Supplement, that appeared in late September of '53. [63]

Q. Now, you are familiar with the property, are you not? A. I am.

Q. Does that generally represent the property of the Crystal Palace Market? A. It does.

Trial Examiner Bennett: Is this all on one floor?

The Witness: That is all on one floor, yes, sir.

(Testimony of Sidney A. Haag.)

Mr. Magor: I formally offer General Counsel's Exhibit 19.

Mr. Davis: No objection.

Trial Examiner Bennett: It may be received.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 19 for identification and received in evidence.)

Q. (By Mr. Magor): Now, would you please look at this diagram, Mr. Haag. On the righthand side I see the figuring, "8th Street"; what does that indicate?

A. That is the westerly boundaries of our property, 8th Street in San Francisco.

Q. Is there an entrance to the market at that location?

A. There are two entrances. You can see the two little indentations on the map, at 8th Street. Those are both entrances.

Trial Examiner Bennett: Is that an indentation above "Meats" and an indentation below "Grocery"?

The Witness: That is correct. [64]

Q. (By Mr. Magor): Now, on the lower corner of the diagram I see a symbol "Market Street"; what does that indicate?

A. That is Market Street in San Francisco.

Q. And is there an entrance, or are there entrances at Market Street?

A. Yes, alongside of the front fruit display, to the lower left, there are two entrances, and there's still another entrance further to the right, into the appliance department, through which the market

(Testimony of Sidney A. Haag.)

can be entered, at the sports shop, or back at the rear end of the housewares.

Q. Now, on the lefthand side I see the symbol, "Stevenson Street." What does that indicate?

A. Stevenson Street. That's the end of Stevenson Street in San Francisco.

Q. Is there an entrance to the market there?

A. There is one entrance there, as indicated.

Trial Examiner Bennett: Before you leave Market Street, how many entrances are there on Market Street, in all?

The Witness: To the market directly, two; indirectly to the market, one.

Trial Examiner Bennett: Well now, I see a little indentation on either side of the fruit designation.

The Witness: That's two of them.

Trial Examiner Bennett: And then you have one, apparently, near the jeweler. [65]

The Witness: No, that's an entrance into the building. There's a building there, six-story building.

Trial Examiner Bennett: That has nothing to do with the market?

The Witness: Nothing to do with the market, no.

Trial Examiner Bennett: Well, then, is there an entrance at the appliance store?

The Witness: That is an indirect entrance where —As I explained, you can go in through the sports shop, and then go through the housewares and into the market near the central location.

(Testimony of Sidney A. Haag.)

Trial Examiner Bennett: If I follow you, there is an entrance at the side of the sports shop?

The Witness: That is correct.

Trial Examiner Bennett: Would you indicate it?

The Witness: Yes, it is right here. I don't know what the idea of this heavy black line is, because it is meaningless. It means nothing.

Trial Examiner Bennett: Indicating the heavy black line directly above the sports shop.

The Witness: Because you can go right on through here, then, you see, there'd be another entrance back in here.

Trial Examiner Bennett: Before you get that far, how does one get into the sports shop from the street?

The Witness: Through the appliance store. That is all [66] open. In other words, it is one department after another. There is no physical separation.

Trial Examiner Bennett: Actually, I count only three entrances on Market Street.

The Witness: That is what I said.

Trial Examiner Bennett: The appliances, and the two on either side of the fruit section.

The Witness: That is correct.

Trial Examiner Bennett: All right, next question.

Q. (By Mr. Magor): Now, above Stevenson Street, on the lefthand side, I see the indication of "Jessie Street." What does that indicate?

A. That is a prolongation of Jessie Street in

(Testimony of Sidney A. Haag.)

San Francisco, and there are steps there that permit entrance to the market.

Q. Where are those located?

A. There are no steps indicated. You see the entrance here, and this little cut-off here, there are steps going up into the market.

Trial Examiner Bennett: Apparently that takes you right by the steam beer.

The Witness: That's correct.

Q. (By Mr. Magor): Now, on the upper portion of the exhibit I see the indication "Mission Street." What does that indicate?

A. That is the southernmost boundary of our property and is the boundary of our customers' parking lot. [67]

Q. Is that indicated by a free parking area?

A. That's correct.

Q. And who is that parking area used by, customers only, or do other people use it?

A. Customers only.

Q. I see below that "Truck Lane." What does that indicate?

A. That is immediately outside of the market building proper, and is used by trucks for bringing in of merchandise of various kinds, either tenants' truck or purveyors' trucks.

Q. Now, can you tell the Trial Examiner from that diagram where J. M. Long and Company, Inc.'s Grocery Department is, within the Crystal Palace Market?

A. Yes, that is the Grocery Department, so indi-

(Testimony of Sidney A. Haag.)

cated, that you see between Jessie and Stevenson Streets.

Q. All right. Now, would you tell the Trial Examiner——

Trial Examiner Bennett: Before we get on another topic, are there any entrances directly from the free parking area to the premises?

The Witness: Yes, there are four, as so indicated there.

Trial Examiner Bennett: Would you spell those out for us?

The Witness: Well, there's one immediately next to the—to the left of the steam beer place.

Trial Examiner Bennett: That is a different entrance than the one at Jessie Street? [68]

The Witness: That's a separate entrance, that's correct; and there's a second between a fish and poultry and fruit and vegetable department; there is a third between the other end of that same fruit and vegetable department and the liquor department, and there is a fourth between the liquor and tobacco departments.

Trial Examiner Bennett: I assume that you are going to clarify who uses which entrances and that sort of thing?

Mr. Magor: We will clarify it at the present time.

Q. (By Mr. Magor): Do customers use the entrances that you have just described?

A. They do.

Q. And trucks use the entrances there, too?

(Testimony of Sidney A. Haag.)

A. They do.

Trial Examiner Bennett: How about employees on the premises, whether working for Long or otherwise?

The Witness: If they come in prior to 8:00 o'clock, they use the door between the fruit and vegetable and the liquor departments, which is the only one open; if they come in after 8:00 o'clock, all doors are open.

Trial Examiner Bennett: For the employees?

The Witness: For everyone.

Trial Examiner Bennett: Employees are authorized to use all entrances after 8:00 a.m.?

The Witness: That is correct. [69]

Trial Examiner Bennett: And you are referring to employees of both Long and the concessionaires?

The Witness: That is correct.

Q. (By Mr. Magor): Would you tell us from that diagram where Standard Groceteria operates their grocery department?

A. Yes, Standard Groceteria is directly opposite Long's on 8th Street, as indicated on the map.

Q. Where it says, "Grocery"?

A. That is correct.

Trial Examiner Bennett: That is clear across the premises?

The Witness: That's right.

Q. (By Mr. Magor): Above that it says, "Meats"; is that operated by Standard Groceteria?

A. No, no, that's a different tenant entirely.

Q. Now, is there any physical separation around

(Testimony of Sidney A. Haag.)

the operations of Standard—or, strike that—of J. M. Long and Company's grocery department, within the market?

A. Will you repeat that question, please?

Q. Is there any physical separation, any——

A. Yes.

Q. ——wall or anything around the operation of J. M. Long and Company?

A. Well, the back end of wall fixtures produce a wall on the—on two sides, that is, the sides facing Jessie and the [70] side facing the market generally. On the lower side, the break is by check stands.

Q. What do you mean by "check stands"?

A. Well, where customers bring their merchandise that has been selected, and it is checked and priced out and they pay for it.

Q. Is there any turnstile at that location?

A. Yes—no, not exactly at that location.

Trial Examiner Bennett: Are there checkstands or cash registers at each concessionaire's?

The Witness: No, only on those that have self-service. Some do and some do not.

Trial Examiner Bennett: Well, how about the ones who do not have self-service?

The Witness: Well, they operate from behind counters, just——

Trial Examiner Bennett: Do you pay at each?

The Witness: That's right.

Trial Examiner Bennett: Each one separately?

The Witness: Yes. Each of them are businesses of their own.

(Testimony of Sidney A. Haag.)

Q. (By Mr. Magor): Is J. M. Long and Company, Inc., a grocery department operated as self-service? A. It is.

Q. Is there any paneling between J. M. Long and Company's [71] grocery department and the bulk foods department? A. There is.

Q. And how high is that paneling, approximately? A. Oh, five to six feet.

Q. Is there paneling between J. M. Long and Company's grocery department and the soap department?

A. Yes, there is, about the same height.

Trial Examiner Bennett: Is that a separate concession?

The Witness: That is right.

Q. (By Mr. Magor): Now, what physical separation is there between the operations of the grocery department of Standard Groceteria and the rest of the departments in the market, if any?

A. Well, that—Let's start at the bottom, that line running diagonally, there's a separation there formed by the back of counters, which I would say is six, seven feet high. In the front there is really—there is the same bank of fixtures, but entirely along the front.

Trial Examiner Bennett: What do you mean by "the front"?

The Witness: Well, let's say the front of the grocery store facing toward the balance of the market.

Trial Examiner Bennett: That is the heavy line?

(Testimony of Sidney A. Haag.)

The Witness: That is right. There is the same wall that extends around, but in front of that wall Standard Groceteria has a display of various merchandise, mostly boarding house type [72] of canned goods, No. 10 tins, which customers select, and then take into the check stand to be priced and checked out.

Trial Examiner Bennett: I don't know whether this is material or not, but conceivably as the witness identifies each location he might ink it onto the exhibit. I wonder how Counsel feel about that?

Mr. Magor: I have no objection.

Mr. Davis: I have none.

Trial Examiner Bennett: Then we will have a handy reference.

The Witness: We have identified first Long's——

Q. (By Mr. Magor): Are you now writing Long's location on the diagram?

A. I have written "Long's" in there, and the other one that we have, that we have just discussed, I am writing "Standard."

Trial Examiner Bennett: Don't write anything else but the name of the enterprise.

The Witness: That's right.

Q. (By Mr. Magor): Now, how many entrances are there to Standard Groceteria's market, that customers enter and come from?

A. There are two, on either side of the two checkstands; one on—there's two checkstands and there's an entrance on either side of them, two in all.

(Testimony of Sidney A. Haag.)

Q. Is that there where customers would check in and out? [73] A. That is right.

Trial Examiner Bennett: That is facing the rest of the market?

The Witness: That is right.

Q. (By Mr. Magor): How many entrances or checkstands are there for Long's Grocery?

A. I think it's five, and then between the bulk foods and the soap department there's an entrance, a turnstile, and over in the lower corner, near the five-and-ten-cent warehouse, there's another turnstile. They are not indicated on here.

Trial Examiner Bennett: Can you give us an approximation of the footage of this establishment, not including the parking area?

The Witness: Well, I can give you an over-all total of the entire property, just a trifle under four acres.

Trial Examiner Bennett: That includes the parking area?

The Witness: That is right.

Q. (By Mr. Magor): Can you give us an estimate of the approximate distance between Standard Groceteria and the restaurant and bar, the aisleway that is located on the exhibit, in feet?

A. Yes, I would say between eight and ten feet, approximate.

Trial Examiner Bennett: I assume Counsel can stipulate as to the extent of traffic on Market Street at that particular location, namely, pedestrian traffic. [74]

(Testimony of Sidney A. Haag.)

Mr. Davis: We'd be glad to try to stipulate to the extent of the traffic inside the market, too.

Trial Examiner Bennett: Well——

Mr. Davis: I don't know what the number——

Trial Examiner Bennett: I am personally familiar with the exterior of the market, though I don't recall having been in it, but I don't think the record or picture would reflect the nature of the neighborhood, which as we all know is in downtown San Francisco, and a very heavily traveled area, at least on Market Street.

Mr. Davis: I'd be glad to stipulate to that.

Mr. Magor: I will so stipulate.

Q. (By Mr. Magor): Now, directing your attention, Mr. Haag, to the month of February, 1955, was Long's Grocery closed at any time during that month?

A. Yes, they were closed from 6:00 o'clock on February 3rd until the morning of February 24th.

Q. Were the clerks, food clerks working at that time, or what happened to them?

A. They were working.

Mr. Davis: Are you still talking about Long's Grocery?

Mr. Magor: Long's Grocery.

The Witness: They were working up until 6:00 o'clock on the 3rd.

Q. (By Mr. Magor): What happened at 6:00 [75] o'clock on the 3rd?

A. They were laid off.

Q. What was the reason for their being laid off?

(Testimony of Sidney A. Haag.)

A. An agreement that we had with the Retail Grocers Association that a strike against one of its members would be a strike against all. We had been informed that on that day Local 648 had picketed some certain grocery stores and in compliance with our program, we closed our department, laid off the employees.

Q. Now, can you tell us to your own knowledge, on February 3rd and thereafter, whether or not the clerks, members of 648, were working at Standard Groceteria and Market?

A. The conditions as regards Standard were exactly those of Long's.

Q. Now, you say you closed. What physically was done to the—first, to Long's Grocery within the market?

A. Well, the place was closed. Along two sides of it there are sufficiently high partitions. In front there was a series of curtains, that made entrance into the grocery store well nigh impossible.

Trial Examiner Bennett: You drew the curtains?

The Witness: Drew the curtains.

Trial Examiner Bennett: Is it correct to say that below Stevenson Street and above Jessie Street there are common walls of adjacent buildings?

The Witness: That is true. [76]

Q. (By Mr. Magor): Will you tell us, physically what was done, to your own knowledge, with respect to the operations of Standard Groceteria within the market, from February 3rd?

A. The front of their department, that faces

(Testimony of Sidney A. Haag.)

the balance of the market, was also protected by curtains.

Trial Examiner Bennett: They were transacting no business?

The Witness: None.

Q. (By Mr. Magor): Now, were the bulk foods departments and the creamery departments and the delicatessens closed down, to your knowledge?

A. That's a rather hard question. To the best of my knowledge, it was an on and off proposition. They were closed, and then they were open, and then they were closed again.

Q. Some days they were closed and other days they were not, is that correct?

A. That's right, that's right, with the exception of Ostrow's, who closed on the 7th, to the best of my knowledge, and then again opened on the 24th.

Q. Now, did you hold any meetings, was any meeting held with the people operating the bulk foods, creamery and delicatessen departments?

A. Yes, on February 12th, that is a Saturday, I was called at my home and told that those people desired to have a meeting.

Q. Did you thereafter hold a meeting with them? [77]

A. And I held a meeting with them on that day, approximately at 1:00 o'clock.

Q. Where was the meeting held, Mr. Haag?

A. In my office.

Q. Will you tell us who was present and identify them?

(Testimony of Sidney A. Haag.)

A. Yes. There was Freese's Delicatessen, Pay'n Takit, Holzer, Damonte——

Trial Examiner Bennett: Who is Damonte?

The Witness: Italian Importing Company. Mrs. Spataro——

Q. (By Mr. Magor): Spell that name, please.

A. S-p-a-t-a-r-o.

Q. What is her operation?

A. She operates a creamery and delicatessen; and either Mr. or Mrs. Roditti; they were in and out, one in and then the other out.

Q. What operation of theirs was in the market?

A. Kessler's Delicatessen.

Q. Were you present at the meeting yourself?

A. I was.

Q. Who else was present? A. Mr. Green.

Q. Can you identify Mr. Green?

A. Mr. Green is the General Merchandise Manager of J. M. Long and Company.

Q. All right. Will you tell us, to the best of your [78] recollection today, what was said and who said it.

A. Yes. I was called at home and asked to come over to hold this meeting, or to talk with these people, and upon opening the meeting I asked the purpose. They said that on that day earlier, they had had a meeting with Mr. Lyons, Business Agent for 648, and to my understanding of what was said, that contracts had been presented to them and they were given until six o'clock the following day, which would be Sunday, to sign. So, they asked me what

(Testimony of Sidney A. Haag.)

about it. Well, I told them there was no place in the picture for me, insofar as telling them to sign or not to sign; that had to be decided by each of them individually; and I further told them that in the event that they decided not to sign, that under no consideration would I permit them to open their places on Monday morning, in order to effect a safeguard against any picketing Local 648 might have in mind as far as the Crystal Palace was concerned, my feeling being that the two grocery stores had already closed, Ostrow was closed, therefore if these other people stayed closed and made no attempt to operate, there would be no necessity of a picket line.

Trial Examiner Bennett: If I followed your summary before, these people operated bulk foods, creameries or delicatessens?

The Witness: That's right.

Trial Examiner Bennett: Departments?

The Witness: That is right. [79]

Trial Examiner Bennett: Nothing else?

The Witness: Nothing else.

Q. (By Mr. Magor): What was said by anybody present after that, Mr. Haag?

A. They agreed that they were going to have to make up their own minds, and said that in the event that they decided not to sign a contract, that my demands were clear enough and that they would not open.

Q. Anything else occur at that meeting?

A. Not that I can remember.

(Testimony of Sidney A. Haag.)

Q. Well, after that, did you meet with any representative of Local 648?

A. Yes, on Monday, I think it was the 14th, Mr. Jinkerson called and asked for a meeting with me.

Q. Can you identify who Mr. Jinkerson is?

A. Mr. Jinkerson, to the best of my knowledge, is Secretary of 648, Grocery Clerks Union.

Q. Was the meeting held?

A. A meeting was held, at approximately eleven o'clock that morning.

Q. Where was the meeting held?

A. In my office.

Q. Can you tell us who was present and identify them for us?

A. Mr. Jinkerson, Secretary of the Grocery Clerks Union; Mr. Lyons, a Business Agent of [80] that Union; Mr. Brodke, Secretary of the Produce Clerks Union; Mr. Masseur, Secretary of the — or Acting Secretary, I think it is, of the Butchers Union.

There were representatives there from the Culinary Union, as well as the Maintenance Union. I met those gentlemen, but I don't think I could place them or remember their names.

Trial Examiner Bennett: You referred to Produce Union. Can you be more specific?

The Witness: All right. Mr. Brodke of the Produce Union.

Q. (By Mr. Magor): Is that Local 1017?

A. 1017, that's right.

(Testimony of Sidney A. Haag.)

Q. Now, who else was present besides those gentlemen that you just named?

A. Mr. Green, whom I have identified; besides the gentlemen I just named, I mentioned certain other names that—some of them came in late. I didn't know who they were. I did recognize, though, the Culinary and the Maintenance Union.

Q. All right. Can you tell me what was said at that meeting and who said it?

A. Well, Mr. Jinkerson first asked why J. M. Long couldn't sign the contract and why the other people representing creameries and delicatessens and bulk foods couldn't sign the contract. He pointed out that it was the Union's contention that about 66 percent of all the people, or of all of the stores covered by 648's contract had signed, and [81] suggested that someone should take the leadership in contacting Mr. Tissier and acquainting him with the fact that the great majority of contracts had been signed. At that time I told Mr. Jinkerson that I'd be very happy to contact Mr. Tissier, but that in the event nothing could be gained by that meeting, I pointed out that all of the places affected were closed and not operating, and that, therefore, it wouldn't—it should not be necessary to picket the Crystal Palace Market. In fact, I think it was at that time that I told Mr. Jinkerson that he had my full permission, if he so desired, to picket, to bring his pickets inside the market and picket each of the individual stands. His reply to that was that that wouldn't give him the eco-

(Testimony of Sidney A. Haag.)

nomic force that he needed, there'd be nothing done like that.

Trial Examiner Bennett: You say you invited him to picket each of the stands; are you referring to——

The Witness: Each of the stands that were covered by that contract, that were already closed.

Trial Examiner Bennett: Continue.

The Witness: Subsequently, I called Mr. Tissier, passed on Mr. Jinkerson's words to him. Whether they talked together or not, I don't know, but I do know that about 3:00 o'clock — either I called Mr. Jinkerson or he called me.

Q. (By Mr. Magor): Tell us what was said at that time, sir.

A. And at that time I told him it was my [82] opinion that nothing was going to be gained by the conversations that I had had with Mr. Tissier, Mr. Jinkerson had with me, or possible conversations that the two gentlemen had together, and that if it was still his intention to picket the Crystal Palace Market, despite the fact that all the places were closed, I asked his goodness in giving us at least twenty-four hours' notice so that all of the departments not affected by the strike—I am speaking of produce stands, restaurants, other departments—would have an opportunity to dispose of their perishables, and his reply to that was that that is just so much stalling, and he wouldn't buy it; and the next morning pickets were around the market.

(Testimony of Sidney A. Haag.)

Q. What time the next morning did you observe pickets around the market?

A. I observed pickets at about 8:15, when I came.

Trial Examiner Bennett: What date is this, now?

The Witness: This is on—let's see, this should be on the morning of the 15th.

Trial Examiner Bennett: Tuesday, the 15th?

The Witness: Yes, sir.

Q. (By Mr. Magor): Where did you observe pickets, Mr. Haag?

A. Well, I ordinarily come in the entrance on Stevenson Street, cutting through the Greyhound lot, and there were either two or three there, and then I immediately checked all other entrances and there were two or three pickets at all the other [83] entrances to the market, as well as to the entrance to the customers' parking lot and to the truck lane, and I'd say there were approximately, oh, somewhere between 25 to 30 in front of the Market Street entrance.

Q. What did you observe those 25 or 30 doing in front of the Market Street entrance?

A. They were moving in a circular fashion in front of the two entrances.

Trial Examiner Bennett: I thought there were three entrances on Market Street?

The Witness: There were a couple of pickets in front of the appliance store entrance. The bulk

(Testimony of Sidney A. Haag.)

of the pickets were confined to the two entrances directly into the market.

Trial Examiner Bennett: You say there were pickets at every entrance to the market?

The Witness: That's correct.

Q. (By Mr. Magor): Did you observe——

A. Well now, wait a minute. Let me qualify that. There were no pickets, of course, on our property at those four entrances.

Trial Examiner Bennett: You are referring to the four entrances facing the truck lane?

The Witness: That is right, because that is on our property, and they had no pickets on our property.

Trial Examiner Bennett: Aside from that, there [84] were pickets at all entrances?

The Witness: That is correct.

Q. (By Mr. Magor): Is there a driveway entrance into the truck lane? A. There is.

Q. From 8th Street? A. There is.

Q. Were pickets there? A. There was.

Q. What were they doing?

A. There wasn't so much trouble at that lane; at the free parking area, on the first day, they were actually blocking the entrance to the parking lot by physically standing in the entrance. That didn't last too long. That was stopped around noon or shortly thereafter, and then they picketed on either side.

Trial Examiner Bennett: Of that entrance?

The Witness: Of that entrance.

(Testimony of Sidney A. Haag.)

Trial Examiner Bennett: Is that where it is marked "In"?

The Witness: That is correct.

Trial Examiner Bennett: The truck lane was open?

The Witness: The truck—well, the truck lane was open, with pickets on either side of it.

Q. (By Mr. Magor): Did you observe how these pickets were garbed, can you tell us what you observed? [85]

A. Well, to the best of my recollection, they had the regular — I think it is a blue and white thing that hangs over the shoulder, and it said "A. F. of L. Picket."

Trial Examiner Bennett: A sash?

The Witness: Sash, I guess is what you'd call them.

Q. (By Mr. Magor): Were the pickets carrying any signs?

A. Yes, there were several signs. I remember they were directed—as I remember, they were directed entirely at—one said, "Long's is Unfair," and the other, "Standard Groceteria is Unfair." There were no other names mentioned.

Trial Examiner Bennett: You have now told us what appeared on two of the signs.

The Witness: I said there were two sets. There were two sets. One set said, "Long's is Unfair." The other, "Standard Groceteria is Unfair." There might have been a multiplicity of those signs, but

(Testimony of Sidney A. Haag.)

there were no other names mentioned of any other tenants.

Q. (By Mr. Magor): Did it have a number, or Local number of any Union on the signs that you observed? A. I can't remember that.

Q. Did you see any officials of Local 648 in the picket line?

A. Yes, on the first day of picketing I observed Mr. Lyons carrying a banner, and to the best of my recollection he was in the picket line on Market [86] Street the second day, but not carrying a banner.

Now, on that second day, he might have been adjacent to the picket line. The first day he was directly in it.

Trial Examiner Bennett: I am not clear from your prior answers whether you have told us that there were only two types of signs or not. You have told us that one sign said, "Long's is Unfair," that another sign said, "Standard is Unfair." You said those are the only names that were mentioned. Well, do you mean that nobody else was mentioned on any others, or do you mean that there were other signs which didn't name anybody?

The Witness: No, there were, as I explained, two sets of signs. One set—whether it was eight or ten or fifteen, I can't remember—said, "Long's is Unfair." The other set—there was a various number of those — said, "Standard Groceteria is Unfair." There were no other signs of any kind.

(Testimony of Sidney A. Haag.)

Trial Examiner Bennett: All right, next question.

Q. (By Mr. Magor): What time of day do the doors of Crystal Palace Market open, sir?

A. The doors open at eight o'clock, with the exception of the one that I described before, that is open earlier for employees. For the general public, the doors are open at eight.

Q. What time of day, if J. M. Long's Grocery Department was operating, what time does that normally commence business? [87]

A. Nine o'clock.

Q. What time do the employees generally arrive for work?

A. That I can't exactly answer. Mr. Green can answer that better.

Q. What time does Standard Groceteria open for business, if they were operating?

A. At nine.

Q. What time do the fruit and produce departments begin operation, if you know?

A. At nine.

Q. What time do the doors of Crystal Palace Market close, if at all? A. Six o'clock.

Q. Did you have any conversation with Mr. Allen Brodke at any time during the time the picketing occurred at Crystal Palace?

A. Yes, on either Wednesday or Thursday I ran into Mr. Brodke, or, rather, Mr. Green and I ran into Mr. Brodke and Mr. Vail, I think.

(Testimony of Sidney A. Haag.)

Q. Can you identify who Mr. Vail is, to your knowledge?

A. To my knowledge, Mr. Vail is some sort of State representative of the Retail Clerks. Now, I am not qualified to answer that surely.

Q. Just to your knowledge.

A. And—— [88]

Q. Where were you talking to Mr. Brodke?

A. Well, somewhere in the center of the market. At that time I mentioned to Mr. Brodke that I was pretty "het up," that we had been again selected, and that so many people entirely disconnected with this particular labor dispute, including his own people, were without work, and I said I didn't particularly like Mr. Jinkerson's action. Mr. Brodke replied that if it had been left up to him, he'd have been a lot tougher than Jinkerson.

Q. How long did picketing continue there, Mr. Haag, to your recollection?

A. The pickets were there—well, let me better put it this way. I wasn't there then, most of the time of the 23rd, but the market was open for business fully, as fully as could be immediately after a strike, on the morning of the 24th, which I think was a Friday.

Q. Now, from the time that there were pickets at the Crystal Palace Market until February 24th, were the grocery clerks working for Standard Groceteria or for Long's Groceteria at any time?

A. From the time the pickets——

Q. Yes. A. No, sir.

(Testimony of Sidney A. Haag.)

Q. They were not working at all?

A. No, sir. [89]

Mr. Magor: You may examine.

Cross Examination

Q. (By Mr. Davis): Why weren't these clerks working for Standard or Long's?

A. Well, I presume because they had been laid off on February 3rd.

Q. Well, you know that as a fact, that you laid the clerks off at Long's, didn't you?

A. Personally? No.

Q. Well, who did? A. Mr. Green.

Q. Mr. Green is under your supervision?

A. No, Mr. Green is the General Merchandise Manager of the Corporation.

Q. And what is your position?

A. Vice-President.

Q. Do you have any other title?

A. General Manager of the market as a whole.

Q. General Manager of the Crystal Palace Market? A. That is right.

Q. What duties do you have as General Manager of the Crystal Palace Market?

A. Well, I would say they are manifold, and have to do with the general conduct of the market, the leasing of space, the making of leases with various tenants, having a corps of people, [90] superintendent, advertising manager, engineers and what-not, seeing that they keep up with their particular end of the business, making leases with people in our outside buildings. That's about it.

(Testimony of Sidney A. Haag.)

Q. You mention advertising. Do you handle the advertising for the market?

A. Well, the advertising man, under my supervision, does, yes.

Q. And that's—that advertising is done on behalf of all the tenants in the market?

A. That's right.

Q. What are the terms of the leases that you have with the various tenants?

A. Minimum and percentage.

Q. What does that mean?

A. Well, I'll draw a little example and make it very easy. Let's say that a particular department has a $200 minimum and a percentage of 5 percent. The minimum is paid at the beginning of a month. He will pay his $200. During the month, his business amounts to $6,000. Five percent of $6,000 is 300. He has already paid his $200 minimum, so he would owe a hundred dollars more for that particular month.

Q. What are the lengths of the terms of the leases? A. Month to month.

Q. They are subject to cancellation on thirty days' notice? [91] A. That is right.

Q. What other provisions are there in the leases, if any, in setting forth control over the operation of these various stands?

Mr. Magor: Just a minute. I object to that on the ground it is assuming facts not in evidence.

Mr. Davis: I asked "if any."

Trial Examiner Bennett: He may answer.

(Testimony of Sidney A. Haag.)

A. Well, the lease permits, Number One, that we may enter any department at any reasonable time to see that it is being properly conducted, that it is being conducted in an orderly and clean fashion. We have the right to ask for the books and bank statements as a periodical audit, to determine if all the sales being made are being properly run through the register. There are stipulations in there as to paying for utilities and stipulation for the method by which the advertising is prorated. I think that is generally the most of it.

Q. (By Mr. Davis): Any provision in the leases with respect to labor relations? A. None.

Q. Or labor disputes? A. None.

Trial Examiner Bennett: Do you exercise any control over the labor relations of the various tenants?

The Witness: None whatsoever. [92]

Q. (By Mr. Davis): Well, we might ask right there, Mr. Haag, would you say that your meeting with these lessees on February 12th had anything to do with the decision that they made?

A. I don't know why it should.

Q. The fact is that they all closed on the following Monday, isn't it? A. They did.

Q. Prior to that time they had been operating?

A. That is right, they closed at my request.

Mr. Davis: Yes.

Trial Examiner Bennett: And they remained closed?

The Witness: Not entirely. The fact that on

(Testimony of Sidney A. Haag.)

Tuesday the picket lines were placed around—certainly there was no reason in their trying to keep closed to avoid a picket line, so they opened to the best of their ability, either themselves or partners or wives.

Q. (By Mr. Davis): So that some of them opened and continued operations without employing any help, is that right?

A. Yes. They were closed — all of them were closed on Monday and Tuesday, some of them reopened on Wednesday, and some of them, maybe, on Thursday.

Q. When they reopened, they didn't employ any help? A. They did not.

Q. They didn't return their employees who were [93] members of Local 648 to work?

A. They did not.

Q. Now, when you testified that you gave full permission to Mr. Jinkerson to have the pickets come inside and picket these various departments in the market, exactly what language did you use, Mr. Haag, when you discussed that subject?

A. Essentially just what you have repeated.

Q. Well, what did you say?

A. Well, I probably wouldn't remember exactly, but I remember Mr. Jinkerson was at a previous meeting when I made that same offer to Mr. Brodke, the time when we were picketed, that I would be very happy to permit him to bring his pickets, and picket the departments that were in

(Testimony of Sidney A. Haag.)

dispute, although I saw very little reason for it as long as they were closed.

Trial Examiner Bennett: You said you had made a similar offer previously to Mr. Brodke?

The Witness: That was some years previously.

Q. (By Mr. Davis): This is not the first time the Crystal Palace Market has been picketed?

A. The second since we have owned it.

Q. And what did Mr. Jinkerson reply to what you say you told him?

A. That he would not do that, it would not give him the economic pressure that he wanted.

Q. You are sure he said that? [94]

A. I am sure that he said that.

Q. Did he say, "How ridiculous can you get?"

A. I don't remember his exact words.

Q. You don't remember that, but you do remember that it wouldn't give him the economic strength that he needed?

A. Pressure is the word, not strength.

Mr. Davis: Pressure, all right.

Trial Examiner Bennett: Would you tell us who was present at that conversation?

The Witness: Yes. I enumerated them before. I would guess offhand, Mr. Examiner, there were about twelve people from various Unions. Among them, as I mentioned, from the Produce Clerks Union, the Butchers Union, the Grocers Union, Culinary and Maintenance.

Q. (By Mr. Davis): Are you a member of the

(Testimony of Sidney A. Haag.)

Labor Relations Committee of the Retail Grocers Association, Mr. Haag?

A. I am not. We are not members of the Retail Grocers Association. They hold our proxy.

Q. Well, did you participate in the negotiations with the Retail Grocers Association representatives and the Union representatives that settled this dispute?

A. I attended the last two meetings, I think the last two days, to the best of my recollection.

Q. You participated in the discussion amongst the Employer group as to what the terms of the settlement should be? [95] A. I did.

Trial Examiner Bennett: What was this reference to proxy that you made?

The Witness: I mentioned that we are not voting members of the Retail Grocers Association, but they do hold our proxy, our Power-of-Attorney—I beg your pardon.

Trial Examiner Bennett: For bargaining?

The Witness: That's right.

Q. (By Mr. Davis): Have you related the entire conversation that was—or, discussion that was held between you and the representatives of these Unions that you have named, on February 14th, at least in substance, or was there anything else said?

A. Well, there was a considerable amount of talk, Mr. Davis. I think that was the gist of it.

Q. Prior to the meeting of February 12th, that you held with these various operators of your departments, had you had previous discussions with

(Testimony of Sidney A. Haag.)

any of them as to the subject of whether or not they should remain open or closed, or what their position should be in this dispute?

A. Oh, naturally, when there is a labor dispute or anything, whether it is labor or something else, those tenants are discussing things with me, and at any time that I discuss anything with any of them, individually or collectively, I told them the same thing, that it got to be sort of a ritual, that any [96] decision they made had to be their own decision, whether they signed or didn't sign, we had no power, there was nothing in our lease, we had no desire to tell them one way or another.

Q. Except that on the 12th you did?

A. No, I did not.

Q. Didn't you testify that you told them that under no consideration would you permit them to remain open on Monday?

A. I told them, and I will repeat it again, that it was entirely up to them, individually or collectively, whether they signed or did not sign. Obviously, if they signed, they could remain open; if they did not sign, I would not permit them to open, hoping to forestall a picket line, and not throw out of work a lot of people that weren't at all interested in this strike.

Q. During these conversations you had with any of these operators, either before February 12th or afterwards, did you use the language to them that "While you are in our house you do as we do"?

A. That is not true.

(Testimony of Sidney A. Haag.)

Q. Any language similar to that?

A. No language similar to that.

Q. Was your position the same with the tenants who had contracts or who had collective bargaining relations with 648 through the Grocers Association —was your position with them the same as to the [97] other tenants who did not have such relations?

Mr. Magor: Just a moment—Finished?

Mr. Davis: Yes.

Mr. Magor: I am going to object to that on the ground it is vague and indefinite.

Trial Examiner Bennett: Read the question back.

Mr. Davis: I will rephrase it, if Counsel doesn't understand it.

Trial Examiner Bennett: All right, why don't you do that.

Q. (By Mr. Davis): You are aware, are you not—were you not, Mr. Haag, that some of the operators of departments in your market had negotiated contracts separately with the Retail Grocery Clerks Union?

A. Yes, I was aware that two or three of them had.

Q. Yes. And you were also aware that others, including the J. M. Long Grocery Department, dealt through the Retail Grocers Association?

A. That is right.

Trial Examiner Bennett: These first two or three that you mentioned, if I follow you correctly, they did not belong to the Retail Grocers Association, is that it?

(Testimony of Sidney A. Haag.)

The Witness: Yes, I presume that's right.

Trial Examiner Bennett: And they just bargained by themselves? [98]

The Witness: That is right.

Q. (By Mr. Davis): Now, was your position with all of these operators, whether they were members or represented by the Association or not, the same with respect to the policy they should adopt in dealing with the Union in this lock-out or strike period?

A. I'm afraid I don't exactly understand that question.

Mr. Magor: I am going to object to it on the ground it assumes facts not in evidence, "a policy they should adopt."

Trial Examiner Bennett: The witness doesn't understand the question, so we will have another one.

Q. (By Mr. Davis): You have testified that you had a meeting on February 12th with a group of what you called your tenants, on this problem of whether or not they would sign a Union contract, is that correct? A. That is right.

Q. Now, some of those operators were represented by the Association and others were not, isn't that true? A. I think that is true.

Q. In your discussion with them, did you make any distinction as to what their position should be, depending upon whether they were members of the Association or not? A. I did not.

Q. You have testified that the position of the

(Testimony of Sidney A. Haag.)

J. M. Long Company was that you followed the [99] policy of the Association that a strike against one was a strike against all, is that correct?

A. I don't remember saying that, but it is correct.

Q. I think you have answered that a few moments ago.

A. Oh, all right. That's correct.

Mr. Davis: That's all.

Redirect Examination

Q. (By Mr. Magor): Who were these two or three, Mr. Haag, that you say negotiated separately with Local 648?

A. To the best of my knowledge, one of them was another bulk foods department, Karahadian Brothers. They employ some help. I think another was the Natural Food Center, Health Food Department, and I am not sure, but I think the Crystal Palace Catering Company signed.

Q. Now, were any representatives of any of those three at that meeting in February, 1955?

A. No, because I do not think any of them were at the morning meeting. Obviously, there had been no need for the Union Business Agent to call them to the earlier meeting, if they had already signed.

Q. Does the Natural Food Center employ any employees, to your knowledge?

A. Not ordinarily. Periodically all of those health food stores, whether in the market or out, have demonstrators advertising one line or another,

(Testimony of Sidney A. Haag.)

[100] and to the best of my knowledge those demonstrators must be members of 648, in order to work on the premises.

Q. Now, the Crystal Palace Catering Center, do they employ any employees?

A. Yes, she has generally one other employee.

Q. Do you pay the wages, or did your company pay the wages for employees of any of the tenants —of your tenants in the building, Crystal Palace Market? A. No.

Trial Examiner Bennett: Is it correct to say—correct me if I am in error — that a person can walk freely throughout the premises from one section to another, save for the few instances where there are turnstiles?

The Witness: That is right.

Mr. Magor: No further questions.

Mr. Davis: I am sorry, I overlooked something, Mr. Haag.

Recross Examination

Q. (By Mr. Davis): You have identified on this chart, which is General Counsel's Exhibit 17, several of the—or, I think only two locations, that is, the J. M. Long Grocery Department and the Standard Groceteria. I wonder if you would identify these additional departments on that same map. First, the Bell's Delicatessen, John M. Bell.

A. Bell's Delicatessen is in the lower lefthand corner, where it says, "Eggs." Do you see that?

Q. Yes. A. All right.

(Testimony of Sidney A. Haag.)

Trial Examiner Bennett: He's got a part of that egg rack?

The Witness: That is right.

Q. (By Mr. Davis): Is it a part of it or all of it? A. Oh, he has all of the egg rack.

Trial Examiner Bennett: Oh, Bell takes up the entire area marked "Eggs" on the chart?

The Witness: That's right. Might be easier, Mr. Davis, if you let me follow them down, or do you want to suggest them?

Q. (By Mr. Davis): Well, I don't want to take the time to identify every department in the market.

A. No, I just thought you might want the particular name.

Q. Yes.

A. You'd better call them, call the ones you want.

Q. Joseph Damonte, Italian importing.

A. That's where it says "Italian Foods," more nearly in the center.

Trial Examiner Bennett: Right next to the Mexican Restaurant?

The Witness: That's correct.

Q. (By Mr. Davis): And Morris De Lanis, Pay'n Takit?

A. That's where it says, "Bulk Foods," directly [102] in front of Long's Grocery.

Q. George Freese's Delicatessen?

A. That is the delicatessen directly ahead of the meats, next to Standard.

(Testimony of Sidney A. Haag.)

Q. Oh, yes. Max Ostrow's Delicatessen?

A. Ostrow's is the delicatessen—well, your thing wouldn't show—where the checks are cashed, right where it says, "Checks Cashed," directly above that.

Q. Yes. Fred Holzer, Louie's Delicatessen?

A. He is directly across from Damonte, where it says "Eggs and Cheese."

Q. Spataro Creamery and Delicatessen.

A. That is at—oh, behind—back of Ostrow's you will find "Candy," then you will find "Delicatessen."

Q. Well, yes, to the right on the chart?

A. That is right, right of "Candy."

Q. Yes. Kessler's Delicatessen?

A. Kessler's, as you go up a little higher toward the free parking, you see bakery—directly behind that.

Q. To the right of it?

A. To the right of it. The proprietor there, Mr. Davis, is Roditti. It is operated as Kessler's.

Q. Arcy's Delicatessen?

A. Well, that's toward the parking lot, across from Roditti's. Harry, you could show him that, couldn't you? [103]

Q. Yes, I have got it. Any others?

Now, in any of these stands we have just named, Mr. Haag, are there enclosures or curtains, such as you have described for Long's?

A. I am there so seldom at six o'clock, Mr. Davis, that I can't remember.

Q. You don't recall ever seeing such enclosures?

(Testimony of Sidney A. Haag.)

A. I think some of them, but specifically I wouldn't want to say which ones.

Trial Examiner Bennett: Have what—curtains?

The Witness: Curtains, yes.

Q. (By Mr. Davis): Or any type.

A. Any other type of enclosure?

Q. Yes. Now, is this map drawn to scale, Mr. Haag?

A. I rather doubt that. Possibly, as nearly as possible, but I don't think it's exactly to scale.

Mr. Davis: That's all.

Further Redirect Examination

Q. (By Mr. Magor): As long as you are there, could you possibly look at that map and identify where DZD is located, DZD, the fruit department?

A. Directly above Freese's Delicatessen, up near Standard Groceteria, "Meats."

Q. Where is Gummow's located?

A. Gummow's is the fruit and vegetables right [104] in front of the warehouse along the truck lane.

Trial Examiner Bennett: That means that it is open for selling on three sides?

The Witness: Partially, yes, not entirely.

Q. (By Mr. Magor): Where is Peninsula Fruit located?

A. Peninsula Fruit is the one in between Roditti and Spataro.

Q. Where is Nu-Way Produce located?

A. Nu-Way is in the entire front of the market,

(Testimony of Sidney A. Haag.)

at the Market Street entrance. You will find two places there. One is more or less of a window display and partial selling area, and then directly behind it.

Trial Examiner Bennett: The larger one?

The Witness: Pardon me?

Trial Examiner Bennett: The larger area?

The Witness: They are both—one of them is more or less window display. The front one is mostly window display, with some selling behind it. The rest of it is a regular——

Q. (By Mr. Magor): Where was Rose Ann's located at the time in question?

A. That is located at the lower righthand corner of the grocery store, between the 5 & 10 and the grocery store.

Mr. Magor: That's all. Thank you.

Further Recross Examination

Q. (By Mr. Davis): Where is your office, Mr. Haag? [105]

A. The office is—on the map you can see the stairs going upstairs; right opposite the 5 & 10, and the market offices are located up those stairs, on the mezzanine.

Trial Examiner Bennett: Is there anything else on the mezzanine?

The Witness: Yes, there is a beauty shop.

Trial Examiner Bennett: Is that all?

The Witness: That is all, yes.

Q. (By Mr. Davis): Do you have a view of the

(Testimony of Sidney A. Haag.)

market from your office? A. Yes.

Q. That's through glass? A. That's right.

Mr. Davis: Nothing further.

Mr. Magor: That's all.

Trial Examiner Bennett: Anything further?

Mr. Davis: No, nothing.

Trial Examiner Bennett: You are excused.

(Witness excused.)

Trial Examiner Bennett: Five minute recess.

(Short recess.)

Trial Examiner Bennett: On the record.

Mr. Magor: Mr. Green, would you take the stand, please, sir. [106]

JOHN E. GREEN

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Magor): Will you state your name and address for the record, please, sir.

A. John E. Green, 987 Hawthorne Drive, Lafayette.

Q. What is your business or occupation, Mr. Green?

A. General Manager, J. M. Long and Company, in charge of their retail operations.

Q. By "retail operations," what operations are you in charge of?

A. I am in charge of the Liquor and Tobacco Departments operated in the Crystal Palace Mar-

(Testimony of John E. Green.)

ket, J. M. Long and Company Appliance Department, and Long's Grocery.

Q. How long have you held the position of General Manager? A. Two years.

Q. Tell us briefly what your duties are as General Manager.

A. To supervise all the buying and selling of merchandise, hiring and firing of personnel, supervise the advertising—that's about it. [107]

Q. How many employees does Long have in their Grocery Department, directing your attention to February of 1955?

A. I think at that time we had nine employees.

Q. Now, was the Long's Grocery closed at any time during the month of February, 1955?

A. Yes, it was.

Q. Do you recall what day it was closed?

A. As I recall it, we closed down at six o'clock on February 3rd.

Mr. Magor: May I see General Counsel's Exhibits 17 and 18?

Trial Examiner Bennett: This, here.

Q. (By Mr. Magor): I show you General Counsel's Exhibit No. 18 in evidence, sir, and I ask you if you received a copy of that?

A. Yes, as I recall it, on the afternoon of February 3rd, we received this by mail.

Q. I show you General Counsel's Exhibit No. 17 in evidence and I ask you if you received a copy or copies of that?

(Testimony of John E. Green.)

A. This was included in the same delivery, as I recall it.

Q. What was done after you received General Counsel's Exhibits 17 and 18?

A. About four o'clock in the afternoon when I took those— What is the exhibit number, this one here?

Trial Examiner Bennett: No. 17. [108]

The Witness: ——to our grocery store Manager, after—he was instructed to distribute the copies to our clerks.

Q. (By Mr. Magor): Now, was Long's Grocery open for business on February the 4th?

A. No.

Q. What physically was done with respect to that Grocery Department at Long's?

A. We followed our regular procedure, at six o'clock the department was curtained off, we had canvas curtains that covers the turnstiles, and the check-out stand, and that canvas is padlocked down.

Q. Now, to your knowledge, was Standard Groceteria closed down after February 3rd, 1955?

Mr. Davis: Counsel, isn't all this cumulative? You have had all this testimony already.

Mr. Magor: Possibly.

Mr. Davis: Well, then, I am going to object to it, Mr. Trial Examiner. I don't think that we have to go over the same ground with every witness. This is exactly the same questions and answers elicited from Mr. Haag.

Trial Examiner Bennett: It may well become——

(Testimony of John E. Green.)

Mr. Magor: If so, it's only the second witness, Mr. Trial Examiner.

Mr. Davis: Well, I don't know how many you are going to bring with the same testimony. [109]

Mr. Magor: Well, if I can—if I do, then you can make your objection.

Mr. Davis: I am making it now.

Trial Examiner Bennett: I will follow along with this witness, at least for the present.

Q. (By Mr. Magor): Tell us what occurred?

A. What was the question?

Trial Examiner Bennett: He asked what you observed, if anything, about Standard.

The Witness: They closed down on the evening of the 3rd also, and did not re-open on the 4th.

Trial Examiner Bennett: Were you there every day thereafter?

The Witness: Well, I was there every day except Sundays.

Q. (By Mr. Magor): Did you attend any meeting in the month of February at which Mr. Lyons was present, from the Grocery Clerks Union?

A. Yes, I did. As I recall it, on the 12th—I think that was a Saturday—Mr. Lyons evidently called a meeting. It was held in one of the market offices, where he was discussing the contract with certain operators in the market.

Mr. Davis: I will move to strike the answer as non-responsive. The question was if you attended any meeting with Mr. Lyons.

The Witness: With Mr. Lyons? [110]

(Testimony of John E. Green.)

Mr. Davis: Yes.

Trial Examiner Bennett: The answer may be stricken. I think you can answer it yes or no.

The Witness: No, not that I recall.

Q. (By Mr. Magor): Was there any meeting at which Mr. Lyons was in attendance and you were present? A. Yes.

Q. And where was that meeting held, and when was it held?

A. It was held in one of the market offices on February 12th, about eleven o'clock.

Q. Can you tell us who was present, to the best of your recollection today?

A. As I recall it, Mr. Lyons was present, Mr. Ostrow, Mr. Holzer, Mr. Damonte, Mr. Freese, Mrs. Roditti, and I believe Gerbino, Mrs. Gerbino, I think that is her name.

Q. Can you tell us what was said, to the best of your recollection today?

A. Well, the meeting was in progress when I came in; however, the gist was that Mr. Lyons was explaining the position of the Union, that he was present to offer a contract, the Union was willing to give the operators until Sunday, the following day, till six o'clock Sunday evening, to decide whether they wanted to sign the contract or not.

Q. What was said, if anything, to that?

A. I believe one of the operators asked Mr. [111] Lyons, if they did sign would they be assured that there would be no picketing. Mr. Lyons said he couldn't give that assurance.

(Testimony of John E. Green.)

Q. What else was said, if anything?

A. And I believe the meeting was dismissed after that.

Q. What was done, or what did you do thereafter, if anything?

A. One of the operators came to me and asked if I would contact Mr. Haag and arrange a meeting. I agreed to do that. I phoned Mr. Haag and a meeting was arranged for about one o'clock that Saturday, 1:00 p.m., Saturday, the 12th.

Q. Where was the meeting held, Mr. Green?

A. In Mr. Haag's office.

Q. Can you tell us who was present at that meeting?

A. As I recall it, the same people were present that attended the meeting that Mr. Lyons conducted.

Q. Tell us what was said, if anything.

Mr. Davis: Same objection, this is cumulative.

Trial Examiner Bennett: I will overrule it.

The Witness: At that time these people explained to Mr. Haag that Mr. Lyons had presented these contracts and expected them to sign by Sunday evening, six o'clock. There was a general discussion. Mr. Haag tried to point out to the people that he had no authority to tell them to sign or not to sign; however, he felt that if they did not sign, that he couldn't allow them to open up on the [112] following Monday. With that, I think the meeting was dismissed. There was no general conclusion.

(Testimony of John E. Green.)

Q. (By Mr. Magor): Now, did you thereafter attend any meeting at which Mr. Jinkerson—which Mr. Jinkerson arranged?

A. Yes, on the following Monday, I think it was Monday, or Tuesday, the 14th, Mr. Haag told me that a meeting was scheduled with Mr. Jinkerson in his office, Mr. Haag's office, and asked if I would attend. I believe that meeting was about eleven o'clock in the morning.

Q. Can you tell us who was present at that meeting?

A. As I recall, Mr. Jinkerson was there, Mr. Lyons, Mr. Masseur of the—What do they call the Union? Meat—— Well, Mr. Masseur was present, Mr. Brodke, I think a chap by the name of Vail was there, a representative of the Maintenance Union, and a representative of the Culinary Union.

Q. All right. Tell us what was said and who said it.

Mr. Davis: Same objection.

Trial Examiner Bennett: Are you prepared to stipulate that the prior witness' testimony on this subject is correct?

Mr. Davis: No, I will stipulate that Mr. Green will testify in the same way that Mr. Haag did. That is what my objection is. Witness after witness gets up here and gives hearsay testimony, simply confirming what the previous interested witness said, and I think that is unreasonable.

Mr. Magor: This is corroboration, Mr. Trial [113] Examiner. I submit the question.

(Testimony of John E. Green.)

Mr. Davis: What do we need corroboration for?

Trial Examiner Bennett: I will take the testimony of this witness on this conversation.

The Witness: Now, will you restate the question, please?

Q. (By Mr. Magor): Tell us what was said.

A. At the meeting?

Q. That's right.

A. As I recall it, the meeting was turned over to Mr. Jinkerson with the request that he state his position. I think Mr. Jinkerson pointed out that the Union felt that they had signed up a sufficient number of operators where it was fair for them to expect J. M. Long and Company to sign the contract with the Union. I think Mr. Haag then put the question to me, was I willing to sign the contract. I replied no, that we were standing with the Association. After that there was a question of—let's see—well, we got involved in this discussion about pickets, and Mr. Haag pointed out that he didn't think that it was—as long as the people involved in the trade dispute, J. M. Long and Company and the Standard Groceteria, the delicatessen operators and the bulk food operators were closed down, he didn't think it would be fair to picket the market; however, if Mr. Jinkerson thought that it was necessary, Mr. Haag invited him to bring his pickets within the market and picket those stands that were involved in the trade dispute.

Mr. Jinkerson replied that he didn't think that would solve the question, and it wouldn't give them

(Testimony of John E. Green.)

the necessary economic pressure or whatever he was seeking to obtain.

Q. Anything else said?

A. No, I think that just about closed the meeting.

Q. Now, after the picket line was established around the Crystal Palace Market, did you observe any representatives of Local 648 in the picket line?

A. Yes, I observed Mr. Lyons, I believe, on the first day of the picketing. I think that was the 14th, and I observed Mr. Brodke and Mr. Savin outside the Market Street entrance, not in the picket line but observing the picket line.

Q. Can you tell us who Mr. Brodke and Mr. Savin are, to your knowledge?

A. Representatives of the Food or the Produce Union I guess it is known as.

Q. 1017?

A. I don't know the number. 1017, is that it?

Mr. Magor: You may examine.

Cross Examination

Q. (By Mr. Davis): Mr. Green, are the Liquor and Tobacco Departments operated by the J. M. Long Company located on—can you designate them on General Counsel's Exhibit 19?

A. Well, coming from — coming in from the Market Street entrance, you see where it says "Magazines"? [115]

Q. Right at the——

(Testimony of John E. Green.)

A. Tobacco, Liquor, that's one. Now, going back to——

Q. Is the Magazine Section operated by J. M. Long?

A. That's right, that's part of the Tobacco Department. Now, over on the 8th Street entrance, opposite the truck lane, you see the words, "Tobacco and Liquors."

Q. Will you mark those on the map, please.

Trial Examiner Bennett: Just write "Long's."

Mr. Davis: J. M. Long, or Long's.

Trial Examiner Bennett: Long's will be sufficient.

Q. (By Mr. Davis): Mr. Green, along the back of the—or, parallel to what is designated on this map as truck lane, I see boxes designated, "Warehouse." I think there are one, two, three, four.

A. Right.

Q. Who operates those warehouses?

A. I really don't know. I—they don't belong to us. I imagine they are produce people.

Q. Is that true of the warehouses that are adjacent to the Liquor and Tobacco Department?

A. You are talking about off the 8th Street entrance?

Q. Yes. A. That's right.

Trial Examiner Bennett: There are four warehouses indicated. [116]

The Witness: None of those are controlled by me.

Q. (By Mr. Davis): Or by the J. M. Long

(Testimony of John E. Green.)

Company? A. Only as lessors.

Q. Who are they leased to?

A. I don't know. I don't have anything to do with that. Mr. Haag is responsible for those.

Trial Examiner Bennett: How about the grocery warehouse, below Jessie Street?

The Witness: That is our warehouse.

Q. (By Mr. Davis): Will you mark, "J. M. Long," on that, please. A. Yes.

Q. Or Long's. How about this carpenter shop, next to the grocery warehouse, who operates that?

A. I have nothing to do with that, Mr. Davis.

Q. Do you know who does?

A. I imagine that is controlled by——

Q. Crystal Palace Market, the J. M. Long Company? A. Yes.

Q. You don't know, though?

A. No, I don't. It's under the supervision of Mr. Haag. I am only responsible for the retail operations.

Trial Examiner Bennett: Is that sort of a maintenance department in there?

The Witness: It's a carpenter—that's a carpenter shop. [117]

Trial Examiner Bennett: Not open to the public?

The Witness: No.

Q. (By Mr. Davis): Do you know what work is done in that shop?

A. Well, we have built our own fixtures there.

(Testimony of John E. Green.)

Q. Do you also build fixtures for the other tenants?

A. That I don't know, what the arrangements are.

Q. Now, when you had this meeting with these operators at about eleven o'clock on February 12th, with Mr. Lyons present, did any of the operators ask you if——

A. I didn't have the meeting, Mr. Davis; Mr. Lyons had the meeting.

Q. Well, were you present or weren't you?

A. I was present during part of the meeting, yes, that's right.

Q. All right. During the time that you were present, did any of the operators ask you whether the J. M. Long Company intended to sign the contract with the union? A. I believe they did.

Q. What was your answer? A. No.

Mr. Davis: That's all.

The Witness: That's all?

Trial Examiner Bennett: Just a minute—you are excused. [118]

(Witness excused.)

Mr. Magor: Mr. Donabedian, will you take the stand, please.

DONALD Z. DONABEDIAN

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

(Testimony of Donald Z. Donabedian.)

Direct Examination

Q. (By Mr. Magor): Will you state your name and address for the record, please?

A. Donald Z. Donabedian. My residence is in Burlingame, California; my place of business is in Crystal Palace Market; D-o-n-a-b-e-d-i-a-n.

Q. What is your business or occupation, Mr. Donabedian?

A. I have a fruit and vegetable concession in the Crystal Palace Market.

Q. And what is the name of your business?

A. DZD Produce Company.

Q. How long have you operated the DZD Produce Company? A. A little over six years.

Q. Is that an individual business or incorporated or what? A. No, it is my own business.

Q. What department do you operate in?

A. Department 229 is the number of my department.

Q. Are you a member of the Retail Fruit Dealers Association [119] of San Francisco, Inc.?

A. Yes, sir.

Q. Have you given them a Power-of-Attorney to represent you in labor relations?

A. Yes, sir.

Q. How long have you been a member of that Association?

A. Oh, about four or five years, I imagine.

Q. Directing your attention to the month of February, of 1955, how many employees did you have, Mr. Donabedian?

(Testimony of Donald Z. Donabedian.)

A. I had about six steady employees, and I had one part-time man during the week, and I had a few part-time men on Saturdays.

Q. To your knowledge, are those employees—or, were those employees of yours members of Local 1017? A. Yes, sir, they were.

Q. Can you tell us how long, to your recollection, you have been a member of the San Francisco —of the Retail Fruit Dealers Association of San Francisco?

A. Approximately with the Association—I have been a member around five years.

Q. What business are you engaged in?

A. I sell fresh fruits and vegetables.

Q. Now, there's been testimony here, Mr. Donabedian, that there were pickets placed around the Crystal Palace Market on or about February 15, 1955. Prior to February, or before February 15, 1955, did you have any conversation with any [120] representative of the Fruit and Vegetable Clerks Union, Local 1017?

A. Well, yes, on the Saturday before the Tuesday of the strike—I believe the strike was on a Tuesday—Mr. Brodke came into the market Saturday evening and called me aside, and told me that —not to buy too much merchandise the following Monday, because there may be a strike, and his members would not be able to cross the picket line. So I told him thank you, and that's all there was to it.

Q. Was anybody else present when that conver-

(Testimony of Donald Z. Donabedian.)

sation occurred? A. Not at that time, no.

Q. Do you recall what time of day it was?

A. It was in the evening, between four and five o'clock.

Q. Now, after that, did you have any further conversation with any representative of Local 1017?

A. And then the evening before the strike, Mr. Savin, Pat Savin called me and told me about the same thing. He said there may be a strike, and he advised me not to buy too much merchandise. He said if there was a strike the boys wouldn't be able to come to work.

Trial Examiner Bennett: Who is Pat Savin?

The Witness: He is the Union Agent for the Fruit and Vegetable Clerks Union.

Q. (By Mr. Magor): Who is Mr. Allen Brodke, to your knowledge?

A. I believe he is the Secretary of the Union.

Q. What did you say to Mr. Pat Savin after he told you that?

A. I thanked him and said okay, thank you.

Q. What did you do thereafter?

A. Well, that evening, after the closing of business, I told the boys that—just what Mr. Savin and Mr. Brodke had said. I told them that they had better come to work, though, the following morning just in case nothing happened, and if there were no pickets, for them to come to work.

Q. Tell us what occurred the next day.

A. Well, the following morning——

Q. What time?

(Testimony of Donald Z. Donabedian.)

A. It was about—well, I picked up my truck —I parked my truck behind the market, I came down to pick up my truck about 5:30, and I noticed three pickets picketing on the 8th Street side of the market, with A. F. of L. banners on them, walking up and down. So I figured I guess the strike is on. So I went and got my truck anyway, nobody bothered me, I went down to the market.

Q. What time was that, that you came to the market, Crystal Palace Market?

A. Well, I came back—I made a fast trip and got back about 6:30 or 7:00.

Q. When was it when you first went there to get your truck, what time? [122]

A. It was about 5:30 in the morning.

Q. Where did you go after you got your truck?

A. I went down to the wholesale market, commission market, to pick up my merchandise for the day's business.

Q. Where is the wholesale commission market located?

A. Down here on Washington and Front Street, Davis Street.

Q. San Francisco? A. Yes, sir.

Q. All right, what happened after that?

A. Well, I picked up my load and I came back and went to work at the store. I operated the store by myself.

Q. Did any of your employees report for work on that morning?

A. They didn't—there were a couple of them

(Testimony of Donald Z. Donabedian.)

came down, I guess some of them heard there was a strike on—a couple of them came down, they noticed there were pickets around, so they didn't come in the store.

Trial Examiner Bennett: How do you know that?

The Witness: How do I know what, sir?

Trial Examiner Bennett: They didn't come in?

The Witness: Well, they didn't come into the department to go to work.

Trial Examiner Bennett: Did you see them?

The Witness: I saw a couple of them standing [123] on the outside, on the street.

Trial Examiner Bennett: Outside the store, on the street?

The Witness: On the street, yes, sir.

Q. (By Mr. Magor): Whereabouts outside on the street did you see them stand?

A. Out near the parking area.

Trial Examiner Bennett: The free parking area or the pay parking?

The Witness: Well, when I say, sir, the parking area, I meant on the sidewalk running along 8th Street.

Trial Examiner Bennett: On 8th Street?

The Witness: Yes, sir.

Q. (By Mr. Magor): Now, what time do your employees normally come to work, or what time would they have come to work on that morning?

A. Well, some of them would come at 8:00 and some of them would come at 9:00.

(Testimony of Donald Z. Donabedian.)

Q. What time do they stop working in the evenings?

A. Well, the ones that come at 8:00 go home at 5:00, and the ones that come at 9:00 go home at 6:00.

Q. Did any of your employees work on that day at all? A. No, sir.

Trial Examiner Bennett: What time did you say it was when you saw the men on 8th Street, your men? [124]

The Witness: My men? Around eight o'clock in the morning, sir, a couple of them, not all of them.

Q. (By Mr. Magor): Did you ask any of your employees to come to work on this day?

A. Well, let me think—about—I think it was around nine or ten o'clock I noticed my Manager standing outside, and I told him why not give Pat a ring, find out if he could come to work, because this particular man has a large family, with a number—about six children, and I know he couldn't do without work, so I told him why don't you call up Pat and see if you can come to work. So he said he would, so he telephoned from the telephone booth outside and called Pat Savin to find out if he could come to work, and he came back and told me that he couldn't come to work, so that was it, he didn't work.

Q. Tell us what occurred on the second day of the picketing, if anything—Strike that.

Did Rose Misuraca work for you at any time

(Testimony of Donald Z. Donabedian.)

during the time that the pickets were at the Crystal Palace Market?

A. Yes, sir, she did, one day.

Q. And can you identify Rose Misuraca?

A. Yes, the lady sitting out there.

Q. Did she operate a stand in the market?

A. She operates a fruit stand in the same market, same building that I am in. [125]

Q. How long did she work for you?

A. She worked one day during the strike.

Q. Did you pay her for her services?

A. Yes, sir, I did.

Trial Examiner Bennett: Was her stand closed?

The Witness: Her stand was closed at the time, yes, sir, so one day, it was the second day, I was pretty busy, I was stuck that day and needed help, so she wasn't doing anything, she had closed her stand because she couldn't operate it by herself, so she offered to come and help me, so——

Trial Examiner Bennett: Next question.

The Witness: ——I told her to come to work.

Q. (By Mr. Magor): What happened after that day in which she went to work?

A. Well, the following day I went down to the market as usual to do my buying. I parked my truck—I always park my truck in the same place, down at the wholesale market.

Q. What time of day was this?

A. It was about 5:30, around 5:30, quarter to six.

(Testimony of Donald Z. Donabedian.)

Trial Examiner Bennett: This would be Wednesday?

The Witness: This would be Thursday—yes, sir, because Wednesday Rose worked for me. This would be Thursday. I parked my truck and I went down, out in the street, to do my buying, and as I usually—one of my habits is during the course of my buying to come back to my truck every ten or [126] fifteen minutes, to see if I am receiving my merchandise. When I came back the first time I noticed three pickets picketing my truck, and——

Q. (By Mr. Magor): Did you recognize any of them?

A. I recognized Mr. Brodke, yes.

Q. And how was he garbed or dressed?

A. He had on a business suit and a blue banner on him, with "A. F. of L." written on it.

Q. Did you talk to Mr. Brodke at all?

A. I did; I asked him what was going on, what's the big idea, and he told me that I had employed non-union help the day before and he was picketing my truck. So we—I mean, I tried to reason with him for a few minutes there. I saw it wouldn't do any good, so—and he wouldn't let any of the porters put any of their merchandise on my truck, so I thought I had better go out and get my own merchandise. I borrowed a clamp truck from one of the wholesale houses, that is a truck in which they push the merchandise around—to deliver my own merchandise, and I went down and picked up one load and brought it back and put it on my

(Testimony of Donald Z. Donabedian.)

truck; as I was going back to pick up another load, I noticed that one of the pickets was following me, so I didn't want to get the house in trouble, so I left the clamp truck right in the middle of the street, and I went about my business, and, as I did, I noticed Mr. Brodke walk away from the picket line, and he went somewhere, I don't know [127] where he went; so in a few minutes, as I was walking down the street, someone—there was a gentleman down at the wholesale market by the name of Skeets—I don't know his last name—that is in charge of the porters down there, Union Agent for the porters, and he asked me not to use the clamp truck because he didn't want to have any trouble around there. He said, "We can't stop you from buying, but we cannot drive your stuff, and you can't use our truck to deliver your merchandise," and he said, "So please don't use the truck." So then I was in a spot. I had to get my merchandise, there was no way to get it. So I went back to the truck and asked Mr. Brodke what it was he wanted me to do, because I needed the merchandise. And so he told me that if I would give him my word that I would not hire Rose Misuraca again to work, that he would let them load my merchandise and he wouldn't bother me any more. So we shook hands on the deal and they left my truck, and I received my merchandise and came back to the store.

Q. Did Rose Misuraca work for you thereafter?

A. No, sir.

(Testimony of Donald Z. Donabedian.)

Q. Did you see any representatives, or observe any representatives of Local 648, of the Grocery Clerks Union, in the picket line?

A. I don't know any of the representatives of 648; no, sir.

Q. Did you observe any representatives of Local 1017, the Fruit and Vegetable Clerks Union, in the picket line? [128] A. Mr. Brodke, yes.

Q. Alan Brodke? A. Yes.

Q. When was it you saw him in the picket line?

A. Well, I noticed the first morning of the strike, and then—well, two or three times during the course of the week. I don't remember how many times I saw him.

Q. What was he doing when you first noticed him?

A. He was walking up and down the picket line.

Q. And was he wearing or carrying anything?

A. He was wearing an A. F. of L. banner, yes.

Q. How about the other times that you noticed him, what was he doing?

A. Well, I imagine he was more or less supervising the picket line.

Mr. Davis: I will move that be stricken.

Mr. Magor: That may go out.

Trial Examiner Bennett: Granted.

Q. (By Mr. Magor): What did you observe him doing, Mr. Donabedian?

A. Walking up and down 8th Street.

Trial Examiner Bennett: Did he carry a banner of any kind?

(Testimony of Donald Z. Donabedian.)

The Witness: I don't believe so.

Q. (By Mr. Magor): When did your employees [129] go back to work, if you can recall, what date?

A. I don't remember the exact date. I think it was—let me see—I don't remember the exact date.

Q. Did they go back at all when there was a picket line at the Crystal Palace Market?

A. No, they didn't come back to work until the strike was over.

Q. And how long were there pickets at the Crystal Palace Market, to your recollection, how many days, approximately?

A. About two weeks, I believe, twelve days or two weeks.

Q. Did you have any dispute with your employees concerning wages, hours or working conditions?

A. No, sir, we had no arguments with anyone.

Trial Examiner Bennett: Were you operating under a union contract?

The Witness: Yes, sir.

Trial Examiner Bennett: Or any type of contract at that time?

The Witness: Yes, sir, we have a separate contract with the Fruit and Vegetable Clerks Union.

Mr. Magor: You may cross examine.

Cross Examination

Q. (By Mr. Davis): Mr. Donabedian, did you authorize Mr. Corsini or the Retail Fruit Dealers Association of San Francisco to file and prosecute

(Testimony of Donald Z. Donabedian.)

charges against Local 1017 and Local 648? [130]

Mr. Magor: Objected to on the ground that it is immaterial. The Charge has been filed, the Complaint has been brought.

Mr. Davis: This is cross examination; Counsel asked if he had given a Power-of-Attorney to the Association. I want to find out what that authority was.

Trial Examiner Bennett: I will overrule the objection. You may answer.

The Witness: Well, the Association had Power-of-Attorney, yes.

Q. (By Mr. Davis): And did you authorized them to file charges against the Union with the National Labor Relations Board?

Mr. Magor: Objected to on the ground it is immaterial.

Trial Examiner Bennett: I thought this line was directed to something else, frankly, when I passed on it before. At the moment, I don't see the materiality of it.

Mr. Davis: Well, it is the same point, Mr. Examiner, the authority that he gave to Mr. Corsini, if any, to represent him in any way.

Trial Examiner Bennett: Well, the Board has frequently said that it doesn't make any difference who files charges.

Mr. Davis: Well, then,——

Trial Examiner Bennett: Whether it is an interested party or not, so accordingly I don't particularly see the materiality. [131]

(Testimony of Donald Z. Donabedian.)

Mr. Davis: Very well.

Trial Examiner Bennett: I will sustain the objection.

Q. (By Mr. Davis): Now, Mr. Donabedian, you have said that you had a contract with the Retail Fruit and Vegetable Clerks Union. That contract requires you to hire Union members, does it not?

A. Yes, sir.

Q. And was Rose Misuraca a Union member when you hired her?

A. That I don't know. I mean, the reason I—she came to help me out, because she was an owner of one of the departments in the store, and she came to help me out that one day because her department was closed.

Q. And you didn't call the Union for any help?

A. No, sir.

Trial Examiner Bennett: Did your contract with the Fruit Union give the employees you hired thirty days to join the Union, if you know?

The Witness: Yes, they gave them time to join the Union. I mean at times—I mean—I mean, they have been pretty lenient about hiring help; if they have members that are not working, of course we are supposed to hire the members not working, but if they are full up——

Trial Examiner Bennett: No, without getting [132] into that, I am just interested in the contract provisions.

The Witness: I don't know the contract provisions.

(Testimony of Donald Z. Donabedian.)

Q. (By Mr. Davis): Well, does the contract provision require you to get in touch with the Union and hire Union members who are out of work?

A. If we need help, when they have men available, yes.

Q. Yes, and did you do that before you hired Mrs. Misuraca, or Miss Misuraca?

A. No, I did not.

Q. Now, you have a lease with the J. M. Long Company? A. Yes, sir.

Q. What are the terms of that lease?

A. We have a thirty day lease.

Q. And that means that the company, J. M. Long Company, may cancel your lease on thirty days' notice, is that it?

A. As far as I understand the lease, yes, sir.

Q. And are you entitled to cancel the lease with the J. M. Long Company?

A. Why, I don't understand your question.

Q. Well, you have said that the J. M. Long Company may cancel your lease. A. Yes, sir.

Q. May you, in turn, cancel the lease by serving any kind of a notice?

A. Yes. You mean by pulling out of the market?

Q. Yes.

A. I guess I can pull out any time I want to, yes, sir.

Q. Well, do you know whether the lease permits you to do that or not?

A. I don't know what the exact words are, but

(Testimony of Donald Z. Donabedian.)

I imagine any time I want to close up, all I do is close up.

Q. But you don't know, that's your understanding?

A. That's as far as I know about it, yes, sir.

Q. Do you buy or sell any—or, do you buy any merchandise or anything of value from the J. M. Long Company in connection with your business?

A. No, I don't buy anything from J. M. Long Company.

Q. Do you sell anything to the J. M. Long Company? A. No, sir.

Q. Do you buy anything from any of the other tenants in the Crystal Palace Market?

A. You mean for resale?

Q. Yes. A. No, sir, I don't.

Q. Do you sell anything to any of the other tenants in the Crystal Palace Market?

A. No, sir.

Trial Examiner Bennett: Your only business relationship is one of renting your premises from Long's?

The Witness: Yes, sir. [134]

Q. (By Mr. Davis): What is the name of the Manager that you referred to, that you had this conversation with, your Manager?

A. Mr. Preciado, P-r-e-c-i-a-d-o.

Q. P-r-e-c-i——

A. -a-d-o, yes.

Q. As I understood you, you saw Mr. Brodke the first morning of the—when the—the first morn-

(Testimony of Donald Z. Donabedian.)

ing of the picketing. Now, whereabouts did you see him, at what place, in connection with the Crystal Palace Market?

A. Well, he was outside, he was on 8th Street. They were walking up and down 8th Street, in front of the—where the trucks go into the truck lane there, right here. This is 8th Street here.

Q. Yes. A. Yes, sir, right here.

Q. And what time of day was that?

A. It was about 5:30 in the morning. I don't know the exact time.

Trial Examiner Bennett: What time?

The Witness: About 5:30 in the morning.

Trial Examiner Bennett: Was he alone or were there others there?

The Witness: No, there were others there.

Trial Examiner Bennett: About how many?

The Witness: Two other men that I noticed.

Trial Examiner Bennett: Were all wearing placards?

The Witness: Banners, yes.

Trial Examiner Bennett: Banners.

Q. (By Mr. Davis): Are you sure that Mr. Brodke was wearing a banner? A. I am sure.

Trial Examiner Bennett: I think the error is mine. I referred to him as wearing a banner. I should have said wearing a placard.

Q. (By Mr. Davis): Banner, placard, any designation that would indicate he was picketing?

A. I am sure he was wearing a banner when he

(Testimony of Donald Z. Donabedian.)

was picketing my truck, but I am not sure he was wearing a banner on 8th Street.

Mr. Davis: That's what I thought.

Trial Examiner Bennett: How about the other men on 8th Street?

The Witness: Yes, sir, I know some of them were wearing banners. I don't know who was wearing banners and who wasn't. I didn't pay that much attention.

Trial Examiner Bennett: Are you talking about carrying a pole with a sign, or a sash across the chest?

The Witness: No, no, I am talking about a sash across the chest. [136]

Q. (By Mr. Davis): But you are not sure whether Mr. Brodke was wearing such a banner?

A. Yes, I am sure he was wearing it when picketing my truck, yes.

Q. That is in connection with your hiring Mrs. Misuraca, the picketing down at the produce market, that's when you saw him wearing a banner?

A. That's right. I am not positive about him wearing a banner on 8th Street, no.

Q. Yes.

A. But I think he was. I know some of them were.

Mr. Davis: That's all.

Trial Examiner Bennett: Anything further?

Redirect Examination

Q. (By Mr. Magor): Do you have any ware-

(Testimony of Donald Z. Donabedian.)

house for your fruit and vegetables at the Crystal Palace Market, Mr. Donabedian? A. Yes, sir.

Q. Would you look at that diagram and tell us where it is?

A. My warehouse is right behind the—here is my fruit department right here, and as I go out this door here, my warehouse is right here.

Trial Examiner Bennett: That is the one closest to 8th Street.

The Witness: Yes, sir.

Trial Examiner Bennett: Right behind Long's Tobacco? [137]

The Witness: Yes, sir.

Mr. Magor: That's all.

Recross Examination

Q. (By Mr. Davis): Just one moment. This warehouse behind the Liquor Department, do you have anything to do with that?

A. I have—well, I guess I didn't make that clear. My refrigerator box warehouse is behind the liquor, I mean it is not behind it, I mean there is a wall there and we're in the back, my refrigerated icebox is behind the tobacco department, and I have a warehouse that is behind the liquor department. I have a warehouse that goes all that length there.

Trial Examiner Bennett: You have the first two warehouses?

The Witness: Yes, sir. One of them, an icebox, and the other one is just a storeroom.

(Testimony of Donald Z. Donabedian.)

Trial Examiner Bennett: Anything further?

Mr. Davis: Nothing further.

Mr. Magor: No.

Trial Examiner Bennett: You are excused.

(Witness excused.)

Mr. Davis: Counsel, there were a couple of questions that I'd like to ask Mr. Haag, if you are going to leave for something else; as long as he is still here, would you mind taking it out of order?

Mr. Magor: Not at all. [138]

Trial Examiner Bennett: Go ahead.

FRANCIS HAAG

recalled as a witness on behalf of the General Counsel, resumed the stand and testified further as follows:

Further Recross Examination

Trial Examiner Bennett: The record may indicate that this is the same Mr. Haag who testified before.

Q. (By Mr. Davis): Mr. Haag, if you will refer to this map of the J. M. Long property, the Crystal Palace, this carpenter shop, who operates or controls that?

A. Ordinarily, Mr. Davis, we do. It's been our carpenter shop, making fixtures for our own departments. We have used it in making fixtures for tenants or repairing tenants' fixtures. Presently it is being used by Long's Stores, that's a separate corporation, for making drugstore fixtures.

(Testimony of Francis Haag.)

Q. Now, these warehouses, other than the—well, withdraw that.

The warehouses are leased out to the various tenants in these spaces that are marked "Warehouse" on the map? A. That's right.

Q. Now, one further question on the terms of these leases, Mr. Haag. You have testified that the J. M. Long Company may cancel the lease upon thirty days' notice; is that also true of the tenants?

A. The thirty day cancellation is for either party. [139]

Mr. Davis: That's all I have.

Mr. Magor: No.

Trial Examiner Bennett: That's all.

(Witness excused.)

Mr. Magor: Mr. Corsini, will you take the stand, please.

VICTOR J. CORSINI

called as a witness on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Magor): Will you state your name and address for the record, please.

A. Victor J. Corsini, C-o-r-s-i-n-i; 2418 Lombard Street, San Francisco.

Q. What is your business or occupation, Mr. Corsini?

A. Executive Secretary of the Retail Fruit

(Testimony of Victor J. Corsini.)

Dealers Association of San Francisco, also Public Accountant, State of California.

Q. What is the correct name of that Association?

A. Retail Fruit Dealers Association of San Francisco, Inc.

Q. How long have you been Executive Secretary of that Association? A. Since 1946.

Q. Will you briefly tell us what your duties are as Secretary of the Association?

A. We negotiate several contracts with Labor Unions, on [140] behalf of our membership, also any other things that may come up which would affect the industry, such as Department of Weights and Measures, and standardization of the fruit and vegetable industry, and other business which is—which would affect the retail fruit and produce business.

Q. Do you have the By-laws of the Association with you? A. Yes, I do.

Q. Do you have the original By-laws?

A. Yes.

Mr. Magor: Counsel, I have had Mr. Corsini bring the original By-laws with him. He wants to—I take it he wants to keep his originals. There have been copies prepared, in case you want to examine the original.

Mr. Davis: Do you intend to offer them in evidence?

Mr. Magor: I will offer a copy.

Mr. Davis: What is the purpose?

Mr. Magor: To show the formation and the

(Testimony of Victor J. Corsini.)

organization of this Association. That's the only thing, the purposes of the Association.

Mr. Davis: Well, the only allegation I see in the Complaint is that the Fruit Association is an Employer within the meaning of the Act.

Mr. Magor: Paragraph Two of the Complaint.

Mr. Davis: Oh, I'm sorry. Oh, I see. Okay. No objection. [141]

Mr. Magor: Do you want to examine the originals?

Mr. Davis: No.

Trial Examiner Bennett: I would assume that the allegations of Paragraph Two lend themselves to stipulation.

Mr. Magor: Will you stipulate to the allegations of Paragraph Two, Mr. Davis?

Mr. Davis: Let me glance over them a moment.

Mr. Magor: Surely.

Mr. Davis: I couldn't stipulate that this Association bargains with or signs collective bargaining agreements for any other labor organization than Local 1017. I don't know the number of members it has, but if Mr. Corsini, will state that, I will accept it. Outside of that, I can stipulate to the entire paragraph.

Mr. Magor: Fine, I will accept the stipulation with the provisions you have added to it and I will take that by testimony.

Q. (By Mr. Magor): Do you sign collective bargaining agreements for the members of your Association with any other labor organization be-

(Testimony of Victor J. Corsini.)

sides Local 1017? A. Yes, we do.

Q. Will you name those labor organizations?

A. Let's see, Salesmen, Helpers and Drivers Local 248, A.F. of L.

Trial Examiner Bennett: Is that the only other one? [142]

The Witness: That's the only other one.

Trial Examiner Bennett: Approximately how many members do you have?

The Witness: Approximately 125.

Q. (By Mr. Magor): I show you, sir, a document which has been marked for identification purposes as General Counsel's Exhibit No. 20. I will ask you, sir, if you will tell us what that is.

A. These are membership lists.

Q. And by whom was that prepared?

A. By Retail Fruit Dealers Office.

Q. Does that list the members of your Association? A. Yes.

Mr. Magor: I formally offer it in evidence. I would like the record to indicate at this time that I have offered a duplicate copy, for a duplicate exhibit.

Mr. Davis: No objection.

Trial Examiner Bennett: It may be received.

(Thereupon the above-mentioned document was marked General Counsel's Exhibit No. 20 for identification and received in evidence.)

Mr. Davis: What number? Oh, I'm sorry.

Trial Examiner Bennett: 20.

Mr. Magor: Next is 21?

(Testimony of Victor J. Corsini.)

Trial Examiner Bennett: Yes. [143]

Q. (By Mr. Magor): I show you, Mr. Corsini, documents which have been marked for identification purposes as General Counsel's Exhibits 21 to and including 25, and ask you, sir, if you can identify those? A. These——

Trial Examiner Bennett: Do it by number.

The Witness: GC-25, the Power-of-Attorney given to the Association by Donald Z. Donabedian, DZD Produce—Want the date?

Q. (By Mr. Magor): No.

A. GC-24, the Power-of-Attorney given to the Association by Peter Giannini, Nu-Way Fruit Market; GC-23, the Power-of-Attorney given to the Association by Peninsula Fruit Company; GC-22, the Power-of-Attorney given to the Association by Standard Fruits.

Q. How about GC-21?

A. Oh, GC-21, Power-of-Attorney given to the Association by W. Gummow Produce.

Q. Were those taken from your records?

A. That's right.

Mr. Magor: Could we be off the record just a moment?

Trial Examiner Bennett: Off the record.

(Discussion off the record.)

Trial Examiner Bennett: On the record.

Mr. Magor: On the record. I would like at this time, [144] Mr. Trial Examiner, to withdraw the originals and offer photostatic copies of General Counsel's Exhibits 21 through 25.

(Testimony of Victor J. Corsini.)

Trial Examiner Bennett: I gather there is no objection?

Mr. Davis: No objection.

Trial Examiner Bennett: The photostats may be substituted.

Mr. Magor: And I so formally offer them into evidence at this time.

Mr. Davis: No objection.

Trial Examiner Bennett: They may be received.

(Thereupon the above-mentioned documents were marked General Counsel's Exhibits Nos. 21 to 25, inclusive, for identification, and received in evidence.)

Q. (By Mr. Magor): Do you have any Power-of-Attorney from Rose Misuraca?

A. No, no Power-of-Attorney from Rose Misuraca, the reason being that she became an Employer after April 1st, 1954. It's been the policy of the Association to review their Powers-of-Attorney and request the new Powers just prior to signing a new contract.

Q. Did she give you any authority at any time to represent her in labor negotiations?

A. Yes, she did. She gave me verbal authority.

Q. And when did that occur?

A. That was on or about February 14th or 15th.

Trial Examiner Bennett: Of what year?

The Witness: 1955.

Q. (By Mr. Magor): Since that time have you ever received a written Power-of-Attorney from Rose Misuraca?

(Testimony of Victor J. Corsini.)

A. No, I haven't. We haven't requested it.

Trial Examiner Bennett: What was your most recent contract with Local 1017?

Mr. Magor: I am going to offer it.

Trial Examiner Bennett: Oh, all right.

Mr. Magor: I would like to mark this document for identification purposes as General Counsel's Exhibit No.——

Trial Examiner Bennett: 26.

Mr. Magor: ——26. I am offering copies of the Agreement between the Association and Local 1017. I have shown the original to Counsel and make this statement for the record, that on the original Agreement, on Page 1, it says, "This Agreement made and entered into the 23rd day of March, 1954." In other words, the stamped date, April 1, 1954, should be disregarded.

And on the fourth line thereof appears, typewritten therein, "Retail Fruit Dealers Association of San Francisco," rather than as indicated on the copy, stamped with "V. J. Corsini, Executive Secretary," et cetera.

On the last page of the Agreement the original indicates that it is signed by Victor J. Corsini, Executive Secretary, [146] and for Retail Fruit and Vegetable Clerks Union, Local 1017, it was signed by Alan Brodke, B-r-o-d-k-e, Secretary-Treasurer.

I formally offer into evidence General Counsel's Exhibit 26.

Mr. Davis: No objection.

(Testimony of Victor J. Corsini.)

Trial Examiner Bennett: It may be received.

(Thereupon the above-mentioned document was marked General Counsel's Exhibit No. 26 for identification and received in evidence.)

Mr. Magor: I direct the Trial Examiner's attention to Section One of that Agreement, and Section Two, with respect to Union membership, Section Five with respect to the Employees, and the classifications covered; Section Seven, with respect to strikes and lock-outs; Section Eleven with respect to the effective and termination date of the Agreement.

Mr. Davis: And, so it will be in the same place in the record, the Trial Examiner's attention should also be directed to Section 8-d.

Trial Examiner Bennett: The contract is received.

I'd like to ask the witness, does this contract—did this contract renew itself in 1955, according to its provisions?

The Witness: Unless either party re-opens the contract fifty days prior to April 1st, it is automatically renewed.

Trial Examiner Bennett: What I am asking you is was it re-opened, or did it automatically renew itself? [147]

The Witness: No, it was re-opened.

Trial Examiner Bennett: It was replaced by another contract?

The Witness: No, we have no contract with the Union.

(Testimony of Victor J. Corsini.)

Trial Examiner Bennett: Well, this expired April 1, 1955?

The Witness: April 1, '55.

Trial Examiner Bennett: I would like to ask the General Counsel, what specifically do you have in mind with respect to Section Two, to which you directed my attention?

Mr. Magor: Well, that indicates, Mr. Trial Examiner, the employees covered by the Agreement and the fact that they are to become members of the Union—without specifically reading it to you—to show that the employees of the particular employers involved were members of Local 1017 by the contract. Other than that, I am making no pretention, if that is the problem raised, about the Union Security Provisions of the Contract.

Trial Examiner Bennett: I wondered if you were attacking the Union Security language therein.

Mr. Davis: There is no allegation in the Complaint, Mr. Trial Examiner.

Trial Examiner Bennettt: That is true.

Mr. Magor: True.

Trial Examiner Bennett: That is true. [148]

Mr. Davis: No allegation of commerce either.

Q. (By Mr. Magor): Now, with respect to the question the Trial Examiner asked you, I ask you, sir, if you did receive any notice in reopening that contract? A. Yes, I did.

Q. I ask you if you can identify that letter?

A. This is the reopening letter, dated January

(Testimony of Victor J. Corsini.)

28, 1955, from the Union to the Association, giving notice of reopening the Contract.

Mr. Magor: If there is no objection, I will offer a copy of this rather than the original letter.

Mr. Davis: No objection.

Mr. Magor: I will mark this for identification purposes as General Counsel's Exhibit next in order.

Trial Examiner Bennett: No. 27.

Mr. Magor: I formally offer General Counsel's Exhibit 27 at this time.

Mr. Davis: I don't see the materiality, but I will waive objection.

Trial Examiner Bennett: It may be received.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 27 for identification and received in evidence.)

Q. (By Mr. Magor): When was your first negotiation meeting held with Local 1017, after receipt of this letter? [149]

A. January 28, 1955, with respect to a new Agreement. The first meeting was held on March 21st of——

Q. Of what year? A. 1955.

Q. Now, I think from the testimony we have gathered that pickets were placed at the Crystal Palace Market on February 15, 1955. A. Yes.

Q. Using that date as a guide, before that time did you have any conversation with any representative of Local 1017 with respect to the dispute between the Grocers Association and Local 648, Grocery Clerks Union?

(Testimony of Victor J. Corsini.)

A. Yes, I had several talks between members of the Union—I mean, both Union officials——

Q. Do you recall when the first one was held, or when you first talked to any representative of Local 1017?

A. I think the first one was held—was a telephone conversation, approximately the first week in February, when I could see that conditions with regard to Union 648 and the Retail Grocers was starting to come to a head, and that—I could see it was going to affect my membership. I called Mr. Savin at his home relative to any proposed action on their part, to see how he felt about getting involved with the dispute on—with Local 648.

Q. Do you recall what time it was that you called Mr. Savin? [150]

A. It was about nine o'clock in the evening.

Q. Now, just give us the conversation you had.

A. Well, generally, the conversation was relative to——

Q. Tell us what you said and what he said, as best you can recall.

A. The conversation was regarding pickets being on stores of which my members would be affected, such as——well, to give you one example, Victor's Market. The Employer had called me the previous day, wanted to know how his premises would be affected if pickets were placed in front of the market. In order to clarify the position to the Employer, I told him that I would call several of the

(Testimony of Victor J. Corsini.)

Union people, and I contacted Mr. Savin to see how he felt about the pickets.

Q. All right. Tell us what was said between you and Mr. Savin, as best you can recall.

A. Well, we went into a pretty thorough discussion on the subject, both pro and con, and of course his position was adamant with regard to the pickets being placed on there, and thereby keeping my members from going to work. I argued that it was a violation of the collective bargaining agreement, and also a violation of our no strike, no lock-out clause.

Q. What did Mr. Savin have to say?

A. Well, generally—it's pretty hard to say what he did say, in the exact words, because our conversation became quite heated. Generally, though, it was I defending the position of [151] the Association, in that he should allow my members to go through the picket lines and go to work, and his attitude, of course, was just the opposite.

Q. Well, what occurred after that, Mr. Corsini?

A. Well, after that, I appeared on the premises at Victor's Market, one of my members.

Q. Now, is that a member of your Association?

A. Member of my Association.

Q. What is his name?

A. His name is Giampaoli. He is the owner of Victor's Market Produce Department.

Q. Is there a grocery department located there, too?

(Testimony of Victor J. Corsini.)

A. Yes, there is Sil's Grocery Department in the same building.

Q. How do you spell that?

A. S-i-l-'-s.

Q. Do you know who owns Sil's Grocery Department? A. I think his name is Sil Bianchini.

Q. Tell us what occurred there, what you observed.

A. Well, when I got there that morning, which was about 7:30 or 8:00 o'clock, there were pickets out in front of the market, and Mr. Savin was there, and Mr. Giampaoli was there, was on the premises at the same time, and we argued whether the clerks should go through the picket lines to go to work. We finally devised a system, which was over the objection of [152] Sil, the owner of the Grocery Department, in roping off a certain section, so that the Fruit Department could stay open.

Q. What occurred thereafter?

A. Mr. Savin left immediately afterwards. I went back to my office and received a telephone call from Tony's Market on Union Street, 2190 Union Street, the proprietor there being Mr. Joe Angel, A-n-g-e-l, and his problem was the same, that there were pickets on his premises and his clerks would not come through the picket line to go to work. I immediately went up there, contacted Mr. Angel and saw that there was a picket out in front, and I said, "I will go talk to the picket," which I did, and asked the picket if he was keeping any of the members from going to work, and his answer was

(Testimony of Victor J. Corsini.)

that he was keeping no one from going to work. With that, the Retail Fruit Clerks went through the picket line and there was no further problem.

Q. You speak of keeping members from going to work; what members are you referring to?

A. I mean Union members.

Q. Of what Union? A. 1017.

Q. Well, did you talk to Mr. Savin or Mr. Brodke thereafter? A. Yes, I did.

Q. Tell us when that was.

A. I think it was the same afternoon, Mr. Savin contacted [153] me at a client's place of business and told me that the situation had been straightened out relative to the pickets, that they would carry banners identifying the economic action as against the Grocery Department, and I said fine, and we shook on it, on the agreement, and I told him that I didn't think we'd have any further problems.

Q. Did you observe the pickets thereafter at Victor's Market and the other places?

A. Yes. I drove by both markets and the pickets had banners specifying Grocery Department, Local 648. Also, my Employers had put banners in the windows saying, "Grocery Department affected by strike only."

Q. Now, did you receive any notification from any of your members with respect to the picket line at Crystal Palace Market? A. Yes.

Q. And from whom did you receive notice of that?

(Testimony of Victor J. Corsini.)

A. Both from Mr. Donabedian and Mr. Gummow, who called me.

Q. Recall when it was they called you?

A. It was on the morning of February 15th, 1955.

Q. What did you do after they notified you of the pickets?

A. They requested assistance relative to keeping their premises open, and I told them that I would see what I could do. I tried to get ahold of Local 1017, and there wasn't anyone there. I left a message, and I think Mr. Bodke called [154] me back very shortly, and I informed him——

Q. All right, Brodke called you back, is that right? A. Called me back.

Q. Now, tell us the conversation as best you can recall, the date, who said it.

A. I said, "Al, I think, as you know, there are pickets at Crystal Palace." He said, "Yes, I understand that there are pickets." I said, "I think this warrants further action by the Association," and he said, "Have you talked to your Employer?" and I said, "Yes, I have talked to my Employers and I can see that if there isn't any further cooperation on your part, I am going to have to take further action."

Q. Is that all that was said?

A. That's the end of the conversation.

Mr. Magor: I have a few other questions of this witness, Mr. Trial Examiner. I'd like to check my

(Testimony of Victor J. Corsini.)

notes. Would this be a convenient time to recess for the day?

Trial Examiner Bennett: Off the record.

(Discussion off the record.)

Trial Examiner Bennett: On the record.

We will recess until ten o'clock tomorrow morning.

(Whereupon, at 4:30 o'clock, p.m., Tuesday, May 17, 1955, the hearing in the above-entitled matter was adjourned until tomorrow, Wednesday, May 18, 1955, at 10:00 o'clock, a.m.) [155]

Wednesday, May 18, 1955

Proceedings

Trial Examiner Bennett: On the record. We will resume with the prior witness.

VICTOR J. CORSINI

a witness called by and on behalf of the General Counsel, resumed the stand and testified further as follows:

Direct Examination—(Resumed)

Q. (By Mr. Magor): Mr. Corsini, how long has your Association been bargaining with Local 1017, approximately for how many years?

A. Well, as I understand, they have been bargaining since about 1937.

Mr. Magor: You may examine.

Trial Examiner Bennett: By "they," you mean the Association?

The Witness: The Association.

(Testimony of Victor J. Corsini.)

Cross Examination

Q. (By Mr. Davis): Mr. Corsini, I am a little confused by General Counsel's Exhibits 22 and 23 as to—from which of your members these two Powers-of-Attorney purport to come.

A. Well, this is Peninsula; you see, these two people used to be in business together.

Mr. Davis: When he says "this," he is referring to General Counsel's 22.

The Witness: 22; GC-23 should never have been given to [158] you. They are not named in the Charge. It used to be his partner, you see.

Q. (By Mr. Davis): So that 23 is not an effective Power-of-Attorney?

A. No, they are no longer in business. I think it used to be Standard Fruit.

Q. Now, in connection with these Powers-of-Attorney, Mr. Corsini, I may have misunderstood you, but I thought I heard you state yesterday that your policy was to obtain new Powers-of-Attorney just before you entered into a new Agreemnet each year with the Fruit and Vegetable Clerks Union, is that right?

A. Yes, in about January we go over our membership list to see, to check our list of new businesses and changes and so forth.

Q. And you obtain the new Powers then? Do you do that for all Employers, all the members, all of your members? A. Yes, we do.

Q. Well, referring you again the General Counsel's Exhibits 21, 23 and 24, I note that—and 25,

(Testimony of Victor J. Corsini.)

I note that in no case is the date of the Power-of-Attorney later than 1952. Why didn't you obtain the new Powers-of-Attorney from these members, or these individuals?

A. Well, we don't obtain new Powers every year. I mean, the Powers that are signed are good until revoked in writing.

Q. Well, then, what do you do each year? I understood you [159] to say you got new Powers-of-Attorney each year.

A. By "New Powers" I mean new businesses or changes in ownership.

Q. Oh, I see. And in none of these cases have you received any notices from any of these individuals that they are—they no longer authorize you to represent them? A. None.

Q. Do you have your members pay dues to your organization? A. Yes, they do.

Q. In each of the firms or individuals represented by General Counsel's Exhibits 21, 23, 24 and 25, are these individuals in good standing, in that they have paid their dues?

A. Some are and some aren't.

Q. Which ones aren't?

A. Martarano is delinquent, Gummow is paid, P. Giannini is paid. That's about all I can remember.

Q. How about Marjolin, or is that——

A. No, Marjolin is no longer in business.

Q. Oh, that's—oh, I'm sorry. Donabedian?

A. Paid, current.

(Testimony of Victor J. Corsini.)

Trial Examiner Bennett: How often are dues payable?

The Witness: They are paid six months in advance. We bill them in January and in June.

Trial Examiner Bennett: When you say a man is delinquent, what does that mean, that he has not paid the prior payment? [160]

The Witness: The prior payment.

Q. (By Mr. Davis): What did you say about Martarano, is he paid?

A. I think he is delinquent.

Q. Oh, for how long?

A. I think he hasn't paid his last billing.

Trial Examiner Bennett: January?

The Witness: January billing.

Mr. Davis: No further questions.

Trial Examiner Bennett: Anything further?

Mr. Magor: That's all.

The Court: You are excused.

(Witness excused.)

Mr. Magor: Mr. Jinkerson, will you take the stand, please.

CLAUDE JINKERSON

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Magor): Mr. Jinkerson, will you tell us your full name and address, please?

A. Claude Jinkerson; business address, 1968

(Testimony of Claude Jinkerson.)

Mission Street, San Francisco; home address is San Carlos, 1703 St. Francis Way.

Q. What is your business or occupation, Mr. Jinkerson? [161]

A. Secretary of the Grocery Clerks Union.

Q. Do you have any other position besides Secretary? A. No.

Trial Examiner Bennett: You are Secretary of the Local?

The Witness: That's right.

Q. (By Mr. Magor): Is that Local 648?

A. Local 648.

Q. How long have you held that position?

A. January, 1938.

Q. Is that an elective position?

A. That is.

Q. Will you tell us who the Business Agents of the Local, 648, were in February of 1955?

A. Eric Lyons, Robert Hunter, Maurice Hartshorn.

Trial Examiner Bennett: Spell it out.

The Witness: H-a-r-t-s-h-o-r-n, Hartshorn.

Q. (By Mr. Magor): Are those elective positions? A. They are.

Q. Who are the other officers, who were the officers of Local 648 in February of 1955?

A. The other officers—Albert De Mello, D-e M-e-l-l-o, President; employed by Embee Stores; Madeleine Harte, H-a-r-t-e, First Vice-President, works for McLean, Goldberg & Bowen Company; Edward Henning, H-e-n-n-i-n-g, Second Vice-Pres-

(Testimony of Claude Jinkerson.)

ident, employed by the Grocery Clerks Union as Insurance [162] Representative, Group Insurance Representative.

Trial Examiner Bennett: Is that a full-time position?

The Witness: That is a full-time job.

Trial Examiner Bennett: Do you devote full time to your present position?

The Witness: Yes, I do.

Trial Examiner Bennett: How about the three Business Agents?

The Witness: They do also. In naming the firms of the other officers, I indicate that they are not employed by us.

Reginald Hutchinson——

Q. (By Mr. Magor): How do you spell that, sir?

A. H-u-t-c-h-i-n-s-o-n, Hutchinson, employed by Monterey Food Palace. He is Recording Secretary.

Elsie McDougal, Job Dispatcher for Local 648, full-time officer; Trustee, George Kent, unemployed; Harold Borden, B-o-r-d-e-n, employed at Rossi's Market on Haight Street.

Albert Z. Groth——

Q. How does he spell that last name?

A. G-r-o-t-h, unemployed. Guard, Samuel Gordon, G-o-r-d-o-n, working for Quality Foods, Incorporated.

I have a Guide, I am trying to think of his name.

Trial Examiner Bennett: Do we have to get down that far?

(Testimony of Claude Jinkerson.)

The Witness: That would complete the roster with the Guide's name. [163]

Q. (By Mr. Magor): Are these all elective positions? A. All elective.

Q. All elective positions.

A. Can you think of him?

Q. Do you know an individual by the name of Frenchie Botanini?

A. No, not by that name. We had a Leonard Bedini, who was a member of our organization, called Frenchie.

Q. How does he spell his last name?

A. B-e-d-i-n-i.

Trial Examiner Bennett: Is he a rank and file member or otherwise?

The Witness: Rank and file member.

Q. (By Mr. Magor): Did you have — When pickets were placed around the Crystal Palace Market, did you have picket captains, Mr. Jinkerson?

A. Yes, we did.

Q. Was Leonard Bedini, sometimes referred to as Frenchie, a picket captain?

A. Yes, he was.

Q. Were those picket captains paid by the Local? A. They were not.

Q. Did they volunteer their services or what?

A. They volunteered their services.

Q. Who appointed the picket captains? [164]

A. They were selected by two rank and file members, who were handling the picket assignments.

(Testimony of Claude Jinkerson.)

Trial Examiner Bennett: Were these rank and file members handling the picket assignments with your approval?

The Witness: Yes.

Trial Examiner Bennett: And how many picket captains were there?

The Witness: Oh, some twelve.

Q. (By Mr. Magor): You say the two rank and file members were handling the picket captains with your approval, is that correct? A. Yes.

Q. Did you appoint two rank and file members to appoint picket captains?

A. After the start of the lock-out, one boy volunteered his services, and he became a—in charge of the rostering of people locked out, and the assignment of duties to those people, and from that roster he also selected picket captains, turned them over to the Business Agents, people that he would recommend as picket captains.

Q. And what Business Agent were they turned over to?

A. Well, we had the three who were operating; each approximately had three or four people who were serving as picket captains on a part-time basis; some put in more hours than others, but all of them put in at least four hours a day. [165]

Q. What were the duties of picket captains?

A. The duties of picket captains were to see that members who are locked out were in front of stores that the Union was picketing, that we had a full

(Testimony of Claude Jinkerson.)

complement of pickets at locations that we were picketing.

Trial Examiner Bennett: Did I understand you to say that each of the three Business Agents whom you named handled a number of picket captains?

The Witness: Yes.

Trial Examiner Bennett: Is that right?

The Witness: That's correct.

Trial Examiner Bennett: Did they do it rather than you, or what?

The Witness: They worked with them rather than myself. I knew who the picket captains were.

Trial Examiner Bennett: Well, what was your role in the picketing, if any?

The Witness: My role is to answer any questions that may come up from picket captains or from Business Agents and to take up any problems that members might have.

Trial Examiner Bennett: I am interested in the relationship between you and the Business Agents; are you subordinate to them or are they subordinate to you or what?

The Witness: Well, actually the tie-in is through the Executive Board, and I am delegated the authority to see that [166] the policies of the Board are carried out over the other officers, dispatchers or Business Agents. It is a very thin line of authority. The Secretary is considered the Executive Officer.

Trial Examiner Bennett: To see that the Busi-

(Testimony of Claude Jinkerson.)

ness Agents carry out the policies of the Executive Board, is that correct?

The Witness: That's right.

Q. (By Mr. Magor): And picket captains were to assign pickets to duty and place them in position at the stores picketed, is that correct?

A. That's correct.

Q. And you say Leonard Bedini, sometimes referred to as Frenchie, was a picket captain at the Crystal Palace Market?

A. Part of the time of the lock-out he was a picket captain.

Q. Do you have the Constitution and By-Laws of Local 648?

A. Yes. I had them yesterday, I'm sorry, they seem to be taken out.

Mr. Davis: I have got them in one of our other files. Is this it?

The Witness: That is the International. Ours are gray.

Trial Examiner Bennett: Off the record.

(Discussion off the record.)

Trial Examiner Bennett: On the record.

Mr. Magor: I have no further questions of this witness, [167] until such time as the Constitution and By-Laws are available.

Mr. Davis: I have no questions.

Trial Examiner Bennett: You are excused for now.

(Witness excused.)

Trial Examiner Bennett: I assume you will ar-

range to get a copy of the document in question and get the witness back?

Mr. Magor: Yes.

Mr. Davis: Yes, I think our discussion was off the record. I'd like the record to show that we have no objection to furnishing the By-laws and that the witness had them with him yesterday but somehow they have gotten misplaced and we will be glad to furnish a copy.

Trial Examiner Bennett: Fine.

Mr. Magor: Rose Misuraca, will you take the stand, please.

ROSE MISURACA

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Magor): Would you state your name and address for the record, Rose?

A. Rose Misuraca, 1353 Bush in San Francisco.

Q. What is your business or occupation, Rose?

A. I am operating a fruit and produce stand.

Q. How long have you been operating a fruit and produce [168] stand?

A. Since January of this year, '55.

Q. In February of 1955, where were you operating a fruit and produce stand?

A. I was operating Department 54, it was known at that time as Rose Ann's Fruit and Produce.

Q. And where was Department 54 located?

(Testimony of Rose Misuraca.)

A. In the Crystal Palace Market.

Q. Did you have any employees at that time?

A. Yes, I did; I had one full-time employee.

Q. What was the individual's name?

A. Jack Hagopian.

Q. Did he work for anybody else besides you? At that time?

Q. Yes.

A. He worked one day, I believe a half a day, for Mr. Gummow.

Q. Did you lease from J. M.—or, strike that.

In February of 1955, were you leasing from J. M. Long and Company, Inc.? A. Yes.

Q. Now, do you know, to your own knowledge, whether or not Jake Hagopian was a member of Local 1017?

A. Yes, to my knowledge he was. I understand he is a permit worker, but he pays dues regularly.

Q. Do you know Mr. Pat Savin? [169]

A. Yes.

Q. Did you have any conversation with Mr. Pat Savin prior to the time that a picket line was at the Crystal Palace Market?

A. You mean prior to the pickets?

Q. Before?

A. Before seeing the pickets?

Q. That's right.

A. Well, about a week or ten days previous to that, I had conversations with both Mr. Lyons and Mr. Savin.

(Testimony of Rose Misuraca.)

Q. Were you talking to them both at the same time?

A. Yes, we were sitting in a booth in Manning's Coffee Restaurant in the Crystal Palace, having coffee.

Q. Will you tell us what time of day it was?

A. Oh, I would say it was about 9:30, thereabouts, in the morning.

Q. Was anybody else present at the time?

A. Just Mr. Lyons, Mr. Savin and myself. We were seated in the booth, but there were other people having coffee around us.

Q. Tell us what was said, and who said it.

A. Well, at that time, I was trying to locate my husband, and I remarked, I asked Mr. Lyons first of all if he had seen him or heard of him, and he said no, and I said, "By the way, I understand you fellows are threatening a strike." And he didn't say anything, he grinned, and I said,—— [170]

Trial Examiner Bennett: Who was this, now?

The Witness: Mr. Lyons.

Trial Examiner Bennett: All right.

The Witness: He didn't say anything, he just grinned, and I said, "By the way, Pat, how would that affect us?" He says, "Well, I don't know," he says, "it depends what those fellows do; if they put a picket, of course we won't cross it." So I said, "Well, that would put me in a spot." He said, "Well, then, you'd better prepare yourself."

Trial Examiner Bennett: Lyons did all the talking, is that it?

(Testimony of Rose Misuraca.)

The Witness: That was Mr. Savin.

Trial Examiner Bennett: Oh, well, when did it switch from Lyons to Savin?

The Witness: When I turned to Mr. Savin and asked him, "By the way, Pat, how would that affect us?"

Q. (By Mr. Magor): Is Mr. Savin sometimes referred to as Pat Savin?

A. That's right.

Mr. Davis: He is better referred to at Pat Savin.

Mr. Magor: Pat Savin, I am sure that's right.

Trial Examiner Bennett: I gather that is a more accurate reference.

Mr. Davis: Yes.

Mr. Magor: Is that a nickname or is that his full name, [171] "Pat"?

Mr. Davis: That is a nickname.

Q. (By Mr. Magor): Now, there has been testimony, Miss—Is it Miss or Mrs? A. Mrs.

Q. ——Mrs. Misuraca, that there was a picket line at the Crystal Palace on February the 15th, 1955. Before the picket line was around the Crystal Palace Market, and after this first conversation that you have related with Pat Savin, and Mr. Lyons, did you talk to Mr. Savin at any time after that?

A. Well, we didn't have a direct conversation; however, on Monday, before the picket was established outside, before I noticed the pickets, I was cleaning up my counters—I wasn't open for business, but I was preparing for the following morning's business, and Pat came through the aisles, and

(Testimony of Rose Misuraca.)

as he went by he said, "If there is a picket out there, your boys won't report to work," and he said that in a loud, boastful voice. He didn't direct it to me. I assumed he directed it to me, because I was the only one that would be affected by it, and hollered in a loud, boastful voice, as he sometimes does, walking through the aisles.

Trial Examiner Bennett: How close was he to you when he spoke?

The Witness: Well, my counter is here, and then there is an aisle-way. He was right in the aisle.

Trial Examiner Bennett: Roughly, in feet, how far apart were you?

The Witness: Oh, I'd say about five, six feet.

Q. (By Mr. Magor): Did you have anything to say to him? A. No; he went right out.

Q. Will you tell us what time of day that was?

A. Well, it must have been around 10:30 in the morning.

Q. Would you say this was before the picket line was drawn?

A. It was on the Monday before the Tuesday; the picket was out there on Tuesday.

Q. Tell me what occurred on Tuesday; what time did you go to work?

A. Well, I didn't go in until about nine o'clock or 9:15, thereabouts, and upon arriving there I noticed this large line of pickets out in front of the market.

Trial Examiner Bennett: On what street?

(Testimony of Rose Misuraca.)

The Witness: On Market Street, at 8th and Market Street entrance.

Q. (By Mr. Magor): Can you tell us approximately how many pickets you saw?

A. Oh, must have been about eighteen, twenty of them; and they were walking in a circular motion, but they were right up to the door, whereas no one could get through unless you just walked right over them.

Q. Did you observe any signs that they were carrying? [173]

A. The very first sign that I observed was: "This Market is Unfair to Organized Labor," and, as I started to enter, one of the pickets called to me, "You can't go in there, Lady." And another one said, "Where do you think you're going?" I said, "I'm going inside." They said, "This market is closed; we're locked out." And I said, "This market is not closed, the doors are open and whoever wants to come in can come in." And this one man—I heard him called Frenchie; I didn't know his name, latter name, but I heard him called Frenchie—he says, "Oh, that's all right, she's all right." He said, "Let her go in. We know all about her." And then a few of the other fellows remarked, "Oh, yes, she can't pay her bills." I said, "That's beside the point. If you fellows weren't out here I'd be able to pay my bills." And Frenchie said, "Oh yes, yes we know all about you, Rose. You go on in."

So I walked on into the market, very disturbed, and went—from there I went out to the back, to see

(Testimony of Rose Misuraca.)

if Jack had reported, because he generally did my buying, although I knew he wasn't going to report, he hadn't picked up my day's receipts, to buy, but I looked to see if he was around.

Trial Examiner Bennett: Who is this Jack you are referring to?

The Witness: He was my employee at that time.

Trial Examiner Bennett: Hagopian? [174]

The Witness: Yes. I looked for him, and I couldn't find him, and I noticed that he was standing out at the 8th Street parking lot entrance, there was a picket out there, and I just looked at him and he said, "Well, I can't come in," he says, "I can't work." So then, as we were standing out there, I noticed these seven, eight men holding hands, and the cars couldn't come into the parking lot entrance. They were blocking them physically.

Trial Examiner Bennett: Was that in the free parking area?

The Witness: Yes, it's the parking area that's the main artery to the whole market. We depend upon that for our own——

Trial Examiner Bennett: The free parking area as contrasted with the pay parking area?

The Witness: We don't have a pay parking area.

Trial Examiner Bennett: All right. Continue with your answer.

The Witness: And these men were holding hands, and the cars were trying to come in, but they wouldn't allow them, and this one man said to them, "You are going to have to knock me over to get in

(Testimony of Rose Misuraca.)

here," and the other one said, "If you are a good Union man, you won't come in here," and I said, "What are you boys doing?" I knew the one fellow standing there. I said, "What do you think you are doing?" I said, "How can [175] you do this to us?" And he said,—I said, "How do you expect to work in the market and face the people you have worked with before?" He said, "Oh, I'll work in there." He says, "Don't worry about that. I'll work in there." And I said—I said, "Well, I think we people have some rights, too." I said, "Aren't pickets supposed to be kept moving?" And immediately this Frenchie come running up and he broke it up. He told the boys that they had to keep moving, but before—right after that I walked up to this officer standing on the corner of 8th and Market and I told him about this, and I told him I felt that an officer should be placed there, and he said for me to call—he directed me to call the station for a car, and they sent a car out, and they—as the police drew up, this Frenchie come running up, and he says, "What's the trouble, what's the trouble?" And I had explained to the officers about this incident where they were holding the cars back, and I said, "For my own protection and the protection of the other individual owners in the market, I feel the officer should be stationed here, to keep these men moving, that they are stopping the cars physically, they are standing right in front of them." So he said, "Oh, we are not going to have any trouble," he says, "I pulled that man off the line."

(Testimony of Rose Misuraca.)

Trial Examiner Bennett: Who said this?

Q. (By Mr. Magor): Who said this?

A. Frenchie. He said, "You see, he's gone." He said, "You [176] always have a man like that around." He said, "You can't watch all of them," and he said, "He's not here now." And I said, "Well, for my own protection, I'd feel better if an officer was stationed here, to see that it didn't happen again," and they placed an officer there at that entrance.

Trial Examiner Bennett: You said before that Frenchie told them to start moving?

The Witness: Yes, that was before the officers arrived.

Trial Examiner Bennett: Did they obey Frenchie when he told them to do that?

The Witness: They did, they obeyed him.

Trial Examiner Bennett: Were they holding hands then?

The Witness: No, they cut loose and started walking.

Trial Examiner Bennett: And is that in the same position, near the entrance to the parking area?

The Witness: That's right.

Q. (By Mr. Magor): What did you do after that, Mrs. Misuraca?

A. Well, right, right after that, Frenchie said—I went went inside—let's see, I went inside and I made my own sign and I went outside and picketed the pickets.

Q. What did your sign say?

(Testimony of Rose Misuraca.)

A. My sign simply stated that the Fruit and Vegetable Clerks were not on strike, Department 54 was open for business, and the Union wasn't feeding my children. [177]

Q. Where did you picket?

A. 8th and Market, and then I also went inside the parking lot area, because when I did go out there the customers—when I explained to the customers that the other departments were open for business, they did enter.

Q. Now, did the pickets, or Frenchie, have anything to say to you while you were picketing?

A. Oh, yes, when I was out on the side of the parking lot, with my sign, he said to me, "Oh," he said, "somebody get ahold of Pat Savin." He says, "He'll take care of her." So I said, "Well, I don't care who you get ahold of," I said, "Pat's not feeding me." I said, "He may be a friend of mine, but he's not feeding me," and within ten minutes' time Mr. Savin arrived.

Q. All right, who was present when Mr. Savin arrived?

A. Frenchie and—oh, there were several men milling around there, the pickets.

Q. About what time of day was this?

A. Well, I would say around 10:30, 11:00 o'clock, thereabouts—not exactly sure of the time.

Q. All right. Tell us what was said and who said it.

A. Mr. Savin came running up, and in his loud voice—he's got a normally loud voice—he said,

(Testimony of Rose Misuraca.)

"Rose, what are you trying to prove?" I said, "Well, Pat," I said, "after all," I said, "it's unfair to me, too. I can't even open up for [178] business." And he said, "I know," he said, "but you know how these things are," he said, "we unions have to stick together." He says, "You go on inside." And I said, "Well, my man hasn't shown up for work," and he said, "That's all right," he said, "let things ride." And then I did, I went inside and noticed that my man was working for Mr. Gummow.

Q. And when you refer to your man, who do you refer to?

A. Mr. Hagopian; and he had a yellow jacket on with Gummow's name, and he was working behind the counter.

Trial Examiner Bennett: Is this the time of day when he normally worked for Gummow?

The Witness: Well, he would normally work for me, but it was normal business hours.

Trial Examiner Bennett: You said he worked part time for Gummow.

The Witness: No, I didn't.

Trial Examiner Bennett: Oh, I thought you did.

The Witness: No, I didn't.

Mr. Magor: She said he worked part time on this day.

The Witness: On this day.

Trial Examiner Bennett: That was an exception to the usual?

The Witness: I don't believe I made that statement.

(Testimony of Rose Misuraca.)

Trial Examiner Bennett: Well, I may have misunderstood you, but normally he worked the full day? [179]

The Witness: For me, yes.

Trial Examiner Bennett: But on this particular day, he was working for Gummow, that morning?

The Witness: I noticed him when I walked inside, there he was there, working.

Trial Examiner Bennett: Had you noticed him working for Gummow on any prior occasions?

The Witness: No; he may have, but I never noticed him.

Q. (By Mr. Magor) How long did you observe him working for Mr. Gummow?

A. Well, he didn't work very long, because——

Q. Tell us what you observed.

A. I observed him working there, and then I immediately walked outside again and I saw Mr. Savin, and I said, "Well, Pat, how come my employee is working for Mr. Gummow?" And he says, "That's all right, Rose, I'll take care of that." And I walked inside, and he came out with Mr. Hagopian.

Q. What did he say?

A. Oh, he said, "That's all right, he'll never work for our Union again. He'll be wanting a job again one of these days."

Q. Who was present when that was said?

A. Mr.—I don't recall if Mr. Hagopian heard that or not, but I was there, and I was standing about six feet away from the two of them.

(Testimony of Rose Misuraca.)

Trial Examiner Bennett: Did he still have [180] Mr. Gummow's jacket on?

The Witness: Yes, the yellow coat.

Trial Examiner Bennett: What happened after that?

The Witness: Well, I went on inside and was trying to make arrangements to open for the following day, and I didn't picket—I don't believe I picketed any more that day, until the next day.

Trial Examiner Bennett: Did you see Hagopian inside again that day?

The Witness: No, after that I didn't see him inside any more.

Q. (By Mr. Magor): Did you work for Mr. Donabedian? A. Yes, I did.

Q. How long did you work for him?

A. Well, by working you mean helping?

Q. Well, did you help him?

A. Yes; the next morning I was walking by there—that was the morning of the 16th, I believe—I'm not sure—and Don Donabedian was in a pretty big mess, trying to set up his counter alone, and I said, "Is there something I can do for you?" He said, "Yes, I wish you'd help me." I said, "Well, okay, I'll be glad to help you." So I put on one of his aprons, and I prepared to help him. I helped him all day long, but when I helped him I didn't help him with the intention of working for wages. He offered this money to me, because he [181] knew I needed money.

Q. Did you accept the money?

(Testimony of Rose Misuraca.)

A. I didn't accept it, he stuck it in my pocket, and then I finally did keep it, yes, he insisted I keep it.

Trial Examiner Bennett: That was at the end of the day?

The Witness: At the end of the day, yes.

Trial Examiner Bennett: Does he have a bigger stand than you?

The Witness: Oh, he has the biggest in the market, so his stand was—I mean, it's a tremendous job, it's almost the whole side of this complete room.

Trial Examiner Bennett: This hearing room?

The Witness: Yes. Maybe even bigger.

Q. (By Mr. Magor): Now, did you have any other conversations with Frenchie or any officials or any representatives of Local 648 during picketing?

A. Well, I had a conversation with Frenchie on the corner of 8th and Market the day before the picket was taken off, and then another the day it was taken off.

Q. Well, let's take the day before the picket was taken off.

A. The day before the picket was taken off, I was on my way home from the market, and he said, "Hello, Rose." He says, "Aren't you going to picket us today?" because they teased me quite a bit about picketing. I said, "No," I said, "I think I have done enough for one day. I am going home." [182] And he says, "Oh, it's too bad," he says, "that"—he had heard about my incident, where I was ac-

(Testimony of Rose Misuraca.)

costed by men, and that's what he said, it's too bad about that, he said, "I really read the riot act to the fellows down at the hall. I told them to leave you alone." And I said, "Well, Frenchie," I said, "I'm not afraid of anyone. I believe I am right in what I am doing." And I said, "You boys are hampering my livelihood by being here." I said, "This isn't our fight. You are being unfair to us." And so he said, "Well," he said, "Sometimes these things happen, the little guy always has to get hurt." He says, "No hard feelings," and then I walked on and went home.

Q. What time of day was this?

A. That must have been about 3:30, 4:00 in the afternoon, something like that.

Q. Where were you talking to him?

A. Right before the paid parking lot, on the corner of 8th and Market.

Q. Was anybody else present at the time, Rose?

A. Yes, there was a young lady who had worked for one of the delicatessens. I don't recall her name, but she was there, and the three of us were talking there.

Trial Examiner Bennett: You said that the pickets were still picketing on this occasion?

The Witness: Yes, it was the day before [183] the pickets had been taken off.

Q. (By Mr. Magor): Now, you say you talked to Frenchie again the day the pickets were removed? A. Yes, I was——

Q. Where were you talking to him?

(Testimony of Rose Misuraca.)

A. Right inside the market, at my counter.

Q. Was anybody else present?

A. My daughter was present, but she didn't know what we were talking about; and I believe—I am not sure if Mr. Lyons—he wasn't present, but he was standing over by the stairways, they were preparing to go upstairs for a meeting in the office, and Mr. Frenchie, he come over to me and shook hands with me.

Q. Where did he come from?

A. He was standing by the stairway there going upstairs to the office, the market office.

Q. And who did you observe standing by the stairway going up to the market office?

A. This Frenchie. I am not sure, I can't positively say Mr. Lyons, because some men had started up the stairway already, and he come over to me and shook hands with me, and he said, "I see you are open, Rose." I said, "Yes, I am open for business." And he said, "Good, I am glad to see you opening." He said, "No hard feeling, Kid." He said, "I know that—" he says, "This must have hit you pretty badly," he said, "and I'm sorry, but we're still friends." [184]

Q. Now, did you hear pickets saying anything to customers while you were out picketing?

A. Oh, yes, they were—this Frenchie and this other lady—they had these cards and they had a board that they were writing license numbers down as the people were coming into the lot.

Mr. Davis: Just a moment. I am going to object

(Testimony of Rose Misuraca.)

to that question and ask that the answer thus far be striken. The question is, did you hear pickets say anything to customers. There is no issue here involving customers, and, as a matter of fact, this Trial Examiner knows the law in no way prohibits the discussion and encouragement by pickets of customers in a strike situation, not to come into a retail establishment, so there can be no issue here; it is simply prejudicial and an attempt to prejudice the rights of the Respondents here by this kind of testimony. There's already been enough of this kind of thing from this witness.

Trial Examiner Bennett: Mr. Magor?

Mr. Magor: I will withdraw the question.

Trial Examiner Bennett: All right. The motion is granted.

Mr. Magor: You may examine.

Cross Examination

Q. (By Mr. Davis): Are you a member of the Retail Fruit and Vegetable Clerks Union, Local 1017, Mrs. Misuraca?

A. Am I a member of the Union [185]

Q. Yes.

A. I at one time carried a permit card.

Q. When? A. In March of '54.

Q. For how long?

A. Maybe not longer than two months.

Q. At the time you worked this day for Mr. Donabedian, you were not a member of the Union, nor did you hold a permit card, is that correct?

(Testimony of Rose Misuraca.)

A. Yes.

Mr. Magor: Just a moment. Objected to on the ground it is immaterial.

Trial Examiner Bennett: I will take the answer.

The Witness: That's correct, I was not a member of the Union.

Q. (By Mr. Davis): Did you have a contract with the Fruit and Vegetable Clerks Union, Local 1017, for your stand at the Crystal Palace Market?

A. Do I have one now?

Q. Did you have one in February of 1955?

A. There was one in—well, my husband had one, I didn't.

Q. Your husband had one?

A. That's right.

Q. Did your husband have an interest with you in the stand in February of 1955? [186]

A. Well, yes, my husband holds the lease, and it was taken—his power of operating the business was taken from him by Judge Michaelson and given to me, to operate the business, in court.

Q. So you were the operator, not your husband?

A. That's right.

Q. Now, what did this sign say that you saw the first day, first morning of the picketing?

A. "This Market is Unfair to Organized Labor."

Q. Is that all it said?

A. Well, those were the outstanding words I saw. There may have been other signs stating dif-

(Testimony of Rose Misuraca.)

ferently, but that was the first one that caught my eye.

Q. Well, what were these other signs?

A. Well, other signs also stated J. M. Long.

Q. Anything else?

A. That's all I noticed. The one that I noticed was, "This Market—" and that hurt me most.

Q. Who was carrying that, a woman or man?

A. I don't recall.

Q. Was it——

A. I would say it was a man.

Q. Was it a printed sign?

A. Yes, it was.

Trial Examiner Bennett: Did you see one [187] or more than one at that time?

The Witness: I saw more than one.

Q. (By Mr. Davis): How many?

A. That carried that one particular sign?

Q. Yes. A. I would at least say two.

Q. That's all the sign was, a printed sign—How big was it?

A. It wasn't a huge sign. I don't know the exact size of it, but large enough to catch your eye immediately.

Q. When I say "printed," I mean printed by a printing process, not hand printed.

A. No, it seemed to be the same printing as any other kind.

Q. What color was it?

A. Well, I think it was white with blue, but I'm not—I could be wrong.

(Testimony of Rose Misuraca.)

Trial Examiner Bennett: White background with blue letters?

The Witness: Yes.

Trial Examiner Bennett: You said one of the other signs mentioned had Long's?

The Witness: Yes, they had several signs. Only one other I noticed had J. M. Long.

Q. (By Mr. Davis): Now, you were there around the market for—practically every day during the time of the picketing, [188] were you not?

A. In and out of the market, yes.

Q. Did you continue to see this sign every day?

A. No. In fact, what caught my eye, the very next day that sign no longer was there.

Q. Were you there in the afternoon of the first day? A. Yes, I was.

Q. Was that sign there in the afternoon?

A. I wasn't—no, I don't believe it was. It was there in the morning.

Q. For how long in the morning?

A. It was there all morning, up until noon.

Q. You are sure of that?

A. I am positive.

Trial Examiner Bennett: Coming back to the Long's sign, did that say something else?

The Witness: Just said, "J. M. Long and Company have locked us out," I believe. I am not sure. I mean, I didn't pay too much attention to that. The reason the other hit my eye was because it meant that I was unfair, it seemed to hit home more.

Trial Examiner Bennett: Well, did either one

(Testimony of Rose Misuraca.)

of these two signs you have described indicate the number of a Union on it or anything of that sort?

The Witness: I don't recall. I couldn't truthfully [189] say if it indicated a Union, but I did see those two signs, one that said J. M. Long and Company is unfair to organized labor, and other said, "This Market is Unfair to Organized Labor."

Q. (By Mr. Davis): Did the sign that had the J. M. Long and Company on it have the name of the Union, the name of any Union?

A. I really don't recall.

Trial Examiner Bennett: Did the pickets wear sashes of any kind?

The Witness: Yes, they had the blue sashes, and arm bands that said, "A.F. of L. Pickets."

Q. (By Mr. Davis): Now, you were right there picketing along with the pickets for a number of days, weren't you?

A. Off and on for three or four days, yes.

Q. You were pretty close to these signs all the time, weren't you? A. Not the first day.

Q. How about the other days?

A. The other days, yes.

Q. And you don't recall, after having been in that proximity to those signs all during that time, whether or not any of those signs had the name of any Union on it, on them?

A. One said Grocery Union.

Q. Which one said that? [190]

A. Well, I can't pick out which one, but I saw a sign saying that.

(Testimony of Rose Misuraca.)

Q. Well, what else did the sign say that had "Grocery Union" on it? A. J. M. Long.

Q. You remember that? A. Yes.

Q. Did you picket the first morning of the picketing? A. Yes, I did.

Q. And you picketed adjacent to the sign that you say said, "This Market is Unfair?"

A. I don't say I was adjacent to it.

Q. Well, how far away would you be, how close would you be at any particular time?

A. When I first saw it?

Q. Yes.

A. When I first saw it, I was as close as you and Mr. Brodke.

Q. And all you remember seeing on it, though, is "This Market is Unfair?"

A. "This Market is Unfair to Organized Labor."

Q. You don't recall any other writing on the sign?

A. No. There may have been, but I don't recall seeing it.

Q. Were there any other signs during the time that you were around the market, while the picketing was going on, that said anything else? [191]

A. Standard Groceteria.

Q. You remember that; did that have the name of the Union on it?

A. "Is Unfair to Organized Labor." I could be wrong. I don't recall that sign too well.

Q. Did it have the name of any Union on it?

A. Grocery Union, but not any other Union.

(Testimony of Rose Misuraca.)

Q. But, as far as this sign that you say said, "This Market is Unfair to Organized Labor," you can't remember the name of any Union on it?

A. No, it didn't have any number, no Union on it, just said, "This Market is Unfair to Organized Labor."

Q. That you can recall pretty clearly?

A. I recall that very clearly.

Q. Was there one such sign or more than one?

A. I saw one.

Q. Have you discussed this case with Counsel for the General Counsel?

A. I discussed my own—my own statement with Counsel.

Q. You told him about the signs?

A. We have been over my statement, and I verified what I had said.

Q. Did he discuss with you the legal issues that would be involved in a case like this? A. No.

Q. Didn't mention them to you?

A. No, we just went over my statement.

Q. Anybody else discuss those legal issues that might be involved in a case like this?

A. I have talked with my attorney about it.

Q. Did your attorney tell you anything about signs?

A. All my attorney told me to do was to take notes of what is going on here; and we have an action of our own pending, that's all.

Q. He didn't discuss with you the legal issues as to what rights Unions may have in carrying signs?

(Testimony of Rose Misuraca.)

A. No. We don't deny Unions have rights.

Trial Examiner Bennett: Now,——

Mr. Davis: I am asking you specifically——

Trial Examiner Bennett: Now, you either discussed it or didn't discuss it with your attorney.

The Witness: No, we didn't discuss it.

Q. (By Mr. Davis): Not with any attorney?

A. No, sir.

Q. With Mr. Corsini?

A. No, I don't think so.

Q. Do you recognize this picture, or do you recognize any of the individuals in this picture, Mrs. Misuraca? A. Myself.

Q. Which one is you? [193]

A. Right here.

Q. That is the sign that you have testified about, that you carried? A. That's right.

Q. Would you say that is a fair representation of the picket line scene at the Crystal Palace Market at the time you were picketing?

A. You mean is this the scene?

Q. Yes, is this what it looked like as you recall?

A. I would say so, yes.

Mr. Davis: I will mark this for identification.

Trial Examiner Bennett: Respondent's No. 1.

Mr. Davis: Respondent's No. 1. Unfortunately, Mr. Examiner, I don't have an additional copy, but if I may have permission to withdraw it, later I will supply it.

Trial Examiner Bennett: All right.

(Testimony of Rose Misuraca.)

Mr. Davis: I now offer this Respondent's Exhibit 1 for identification formally into evidence.

Trial Examiner Bennett: The witness wants to take a look at it.

The Witness: May I see it?

Mr. Magor: Yes.

The Witness: This sign here—it's been covered.

Q. (By Mr. Davis): What is that, Mrs. Misuraca?

A. I say this sign here has been covered. [194]

Trial Examiner Bennett: The witness pointed to the sign that has J. M. Long on it and said it has been covered. Now, what do you mean by that?

The Witness: There was other writing on that.

Mr. Davis: What other writing?

Mr. Magor: Just a moment. I am going to object to it as immaterial. I am going to move to strike any testimony on this picture at this time, until we have had an opportunity to examine it.

Trial Examiner Bennett: All right, I think that might be a more desirable procedure. I will let her testimony stand for the present.

Mr. Magor: I show you Respondent's Exhibit No. 11 or——

Trial Examiner Bennett: 1.

Mr. Magor: ——or No. 1 for identification. I ask you, Mrs. Misuraca, when this picture was taken?

The Witness: I don't know when that picture was taken. That's—that may be a copy of the one that was in the paper.

(Testimony of Rose Misuraca.)

Mr. Magor: Do you know when that picture was taken?

The Witness: I was out there on the morning the picket was put on there, the 15th. I am not sure of the date, but the very morning the pickets—first morning the pickets were out there.

Trial Examiner Bennett: But you said you were out there more than once? [195]

The Witness: But I didn't have that sign, only that one morning.

Trial Examiner Bennett: You wore that sign only on one occasion?

The Witness: Yes, that's right.

Trial Examiner Bennett: And that would be the first day the pickets were there?

The Witness: Yes.

Trial Examiner Bennett: Well, that would seem to pinpoint the date, in any event.

Mr. Magor: You wore that sign that you have only on that one morning, is that right?

The Witness: That's right.

Mr. Magor: Do you recall what time of morning you were out there with that sign?

The Witness: Well, that could have been any time after ten, between ten and twelve in the morning.

Trial Examiner Bennett: Were you out there with a sign in the afternoon?

The Witness: No, no.

Trial Examiner Bennett: You made a statement

(Testimony of Rose Misuraca.)

about one of the signs being covered. What did you mean by that?

The Witness: It appears to me this sign—I may be wrong, but this sign, as I saw it, "Unfair. We have been locked out of this market," was on this sign. [196]

Trial Examiner Bennett: Your point is, if I followed your gesture, that there was printed matter under that portion of the sign which says, "J. M. Long and Co."?

The Witness: Yes, that's right.

Trial Examiner Bennett: Well, are you contending that at some time that morning the sign didn't appear in the fashion that it appears in the picture?

The Witness: That's right.

Q. (By Mr. Davis): You are not contending that the sign didn't appear in that fashion at the time the picture was taken?

A. My contention is that that sign has been covered from when I saw it first.

Trial Examiner Bennett: Well, I want you to pay attention to what I am asking you. Are you claiming that it was covered as part of the picture process, or that it was covered before the picture was taken?

The Witness: I am not sure, but I know it's been covered, and it didn't—and I don't remember that sign. I remember this one.

Trial Examiner Bennett: Pointing to the one at the extreme righthand, upper righthand corner of the picture.

(Testimony of Rose Misuraca.)

Mr. Magor: Are you sure, Mrs. Misuraca, that that's the same sign that you saw?

The Witness: This one here, but this one I don't recall. [197]

Trial Examiner Bennett: The one—"J. M. Long?"

The Witness: This one. There was one sign. See, these things come back. This one said, "Unfair, we have been locked out of our jobs."

Q. (By Mr. Davis): Mrs. Misuraca, do you recall at any time while you were picketing, or around the market, seeing this sign as it now reads on the picture? A. No.

Q. Do you recognize this picture?

Trial Examiner Bennett: The witness has been shown another picture.

A. I don't recall this.

Q. (By Mr. Davis): You don't recall this as a picket line sign in front of the Crystal Palace Market?

A. It may have been one, but I don't recall it.

Q. So your testimony is you never recall seeing this sign here that is in the lefthand corner of this second picture?

A. I have never seen this sign, no.

Trial Examiner Bennett: This is an observation of mine, and I don't care whether Counsel explore this, or demolish it, but on both signs there appears to be, in the center of the sign, under "Long's" and under "Co." a little black dot. I am pointing it out to Mr. Davis right now.

(Testimony of Rose Misuraca.)

Mr. Davis: Yes.

Trial Examiner Bennett: As though something were [198] superimposed over the center of the picture. I am not indicating in any way when it was——

Mr. Davis: Mr. Examiner, we are not contending that it wasn't. We are simply asking this witness to identify this sign as a sign having been carried at that time. She testified she was only picketing with this sign in the morning, she recognized this as a sign at the picket scene when she was carrying a sign, so obviously the picture has been identified. How the sign was constructed is another matter.

Trial Examiner Bennett: I quite agree.

Mr. Magor: I don't object to Respondent's Exhibit 1.

Trial Examiner Bennett: It may be received.

(Thereupon the document above referred to was marked Respondent's Exhibit No. 1 for identification and received in evidence.)

Mr. Davis: I have no further questions.

Trial Examiner Bennett: Respondent's 1 for identification is received, and the other picture has been taken back by Mr. Davis.

Mr. Davis: Yes, we'll identify that later if necessary.

Trial Examiner Bennett: As I recall your testimony, that is a picture—you identified yourself on the scene at that time?

The Witness: Yes, but I still feel——

(Testimony of Rose Misuraca.)

Mr. Davis: I will move to strike any part of the answer—— [199]

Mr. Magor: I will move to strike out the answer. The picture is just what it purports to be, a partial view of a scene.

Trial Examiner Bennett: The initial portion of her answer may stand. The latter part of her answer, namely, "I still feel," may be stricken.

Is there any redirect of the witness?

Mr. Magor: Just a couple of questions.

Redirect Examination

Q. (By Mr. Magor): Do you know Mr. Martarano, operating Peninsula Fruit? A. Yes.

Q. Do you know—Have you observed him in the market prior to the time the pickets were placed around the Crystal Palace Market?

A. I observed him. He works there at the stand, yes.

Q. Have you observed how many employees he had in February of 1955, first of February?

A. Well, Mr. Martarano—I couldn't state accurately how many employees he has, but I have seen as many as eight men on a Saturday working for him.

Trial Examiner Bennett: How about on a weekday?

The Witness: Weekday, I imagine about four.

Q. (By Mr. Magor): Now, after the pickets were placed around the Crystal Palace Market on February 15th, 1955, did [200] you observe any of his employees working? A. No.

(Testimony of Rose Misuraca.)

Q. Do you know Mr. P. Giannini? A. Yes.

Q. Does he do business as Nu-Way Produce, to your knowledge, in Crystal Palace Market?

A. To my knowledge, yes.

Q. Directing your attention to the first of February, 1955, had you observed employees working for Mr. Giannini? A. No.

Q. Do you know how many employees he had, if any? If you don't know, say so.

A. I really don't. I couldn't tell you that.

Mr. Magor: That's all the questions I have.

Mr. Davis: I have none.

Trial Examiner Bennett: You are excused.

(Witness excused.)

Trial Examiner Bennett: A five minute recess.

(Short recess.)

Trail Examiner Bennett: On the record.

Mr. Magor: Mr. Brodke, will you take the stand, please.

ALLEN BRODKE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Magor): Will you state your name and address for [201] the record, please.

A. Allen Brodke, 1341 Bay Street.

Q. What is your business or occupation, Mr. Brodke?

A. Secretary-Treasurer, Retail Fruit and Vege-

(Testimony of Allen Brodke.)

table Clerks Union, 1017, 821 Market Street, Room 229.

Q. How long have you held that position?

A. Since March, 1936.

Q. Would you please name the officers of that Local 1017 in February, 1955?

A. Charles Bailey, President; Charles Dadian, First Vice-President; Robert R. Arsanis——

Trial Examiner Bennett: Spell that.

The Witness: A-r-s-a-n-i-s.

Trial Examiner Bennett: His title?

The Witness: What?

Trial Examiner Bennett: His title?

The Witness: Second Vice-President. Ray Carter, Recording Secretary; Allen Brodke, myself, Secretary-Treasurer; Henry "Pat" Savin, Business Representative; Lawrence Gotelli, G-o-t-e-l-l-i, Anthony Genelli, G-e-n-e-l-l-i, Frank Lottice, L-o-t-t-i-c-e, Trustees; Tom Borruso, Guardian. I think that's about all.

Mr. Magor: That's sufficient.

Q. (By Mr. Magor): Do you have the Constitution and By-laws of Local 1017? [202]

A. Well, I kind of go by the International Constitution. There is an index in the back there.

Q. Does it make any—maybe you can do it quicker than I can. Does it make any provision there for the officers and how they are selected, and their duties and powers? A. Oh, yes.

Q. What provision is that of your Constitution?

(Testimony of Allen Brodke.)

Mr. Davis: Are you talking about Local Officers?

Mr. Magor: Local officers. He says he goes by the International.

Mr. Davis: Yes. You mean Local Officers?

Mr. Magor: Local Officers.

The Witness: How the officers are selected and appointed, you mean?

Q. (By Mr. Magor): Right, and the duties of the Local Officers.

A. Yes, it is all contained herein.

Q. It is all contained therein? A. Yes.

Mr. Magor: I would like to have this marked for identification purposes as General Counsel's Exhibit next in order.

Trial Examiner Bennett: I assume that if there is some particular portion of that you want me to note, you will direct it to my attention.

Mr. Magor: I will, as soon as I have a chance to check [203] it.

Mr. Davis: May we have the number?

The Reporter: 28.

(Thereupon the above-mentioned document was marked General Counsel's Exhibit No. 28 for identification.)

Q. (By Mr. Magor): Did you receive a letter, Mr. Brodke, dated February 14th, from Mr. Mario G. Paolini? A. Yes.

Q. Do you have that?

Mr. Magor: I would like to have this marked

(Testimony of Allen Brodke.)

for identification purposes as General Counsel's Exhibit 29.

(Thereupon the above-mentioned document was marked General Counsel's Exhibit No. 29 for identification.)

Mr. Magor: I formally offer into evidence General Counsel's Exhibits 28 and 29, and I ask leave to withdraw GC-29, the original, and substitute a copy therefor.

Mr. Davis: No objection.

Trial Examiner Bennett: They may be received and a copy substituted.

(The documents heretofore marked General Counsel's Exhibits Nos. 28 and 29 for identification, were received in evidence.)

Trial Examiner Bennett: May I see that. [204]

Q. (By Mr. Magor): After receipt of this letter, Mr. Brodke, did you make any written reply to Mr. Paolini? A. I did not.

Q. Did you make any written reply to Mr. Corsini? A. No.

Mr. Magor: That's all the questions I have.

Mr. Davis: No questions.

Trial Examiner Bennett: You are excused.

(Witness excused.)

Mr. Magor: Did you take the letter?

Mr. Brodke: Yes.

Mr. Magor: I will make copies of it.

Mr. Trial Examiner, I have just one further witness, and I will be prepared to rest, and I was informed this morning that the witness upon which

I rely and I feel necessary for certain evidence in my case, alleged in the Complaint—his wife passed away at three o'clock this morning from cancer, and he's not in a condition to come down and testify in this matter.

Now, I have no objection if Counsel wants to go ahead with his defense, but I can see where he might feel it would be prejudicial to his own position to starting presenting his defense and see other evidence that he might have to be confronted with in his own defense, so at this time I would like leave to move for a continuance in this matter until next Tuesday.

Trial Examiner Bennett: Does this witness' testimony lend [205] itself to stipulation? I don't know the name of the witness.

Mr. Davis: I don't either.

Trial Examiner Bennett: It may well be something in which there is no conflict. That, of course, is up to you.

Mr. Davis: I don't know who the witness is.

Mr. Magor: There is no secret about it, Mr. Warren Gummow is the witness.

Trial Examiner Bennett: I think it is something you might explore with each other off the record, and out of my presence.

Off the record.

(Discussion off the record.)

Trial Examiner Bennett: On the record.

Mr. Davis advises me that he is not opposing the request for a recess. General Counsel has also indicated that he'd prefer to have the witness tes-

tify in person. Accordingly, I am disposed to go along with the request for a recess.

Now, as I understand it, this is your last witness?

Mr. Magor: That's correct.

Trial Examiner Bennett: And you are prepared to rest after he testifies?

Mr. Magor: I am prepared to rest after that.

Trial Examiner Bennett: Mr. Davis indicated he has some motions to bring. What I hope for is that we don't run into a delay after Tuesday. [206]

Mr. Davis: I see no reason why we should.

Trial Examiner Bennett: If it is a matter of a few hours or half a day or something like that, I'd go along with you, of course, but what I wanted to do was finish the hearing next week.

Mr. Davis: Well, as far as the Respondents are concerned, we feel the case can be disposed of upon the basis of my motion.

Trial Examiner Bennett: But assuming——

Mr. Davis: Assuming it would not be, we are prepared to proceed.

Trial Examiner Bennett: Fine.

Mr. Davis: With whatever is necessary.

Trial Examiner Bennett: We will recess the case then until ten o'clock next Tuesday morning, that would be Tuesday, the 24th. All right, the hearing is recessed.

(Whereupon, at 11:25 o'clock, a.m., a recess was taken until Tuesday, May 24, 1955, at 10:00 o'clock, a.m.) [207]

Tuesday, May 24, 1955

Proceedings

Trial Examiner Bennett: The hearing will be in order.

Mr. Magor: Mr. Gummow.

WARREN GUMMOW

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Magor): Mr. Gummow, would you state your name and address for the record, please?

A. My name is Warren Gummow. My address is 22 Alvarado, San Francisco.

Trial Examiner Bennett: How do you spell your last name?

The Witness: G-u-m-m-o-w.

Q. (By Mr. Magor): In what business are you engaged, Mr. Gummow?

A. I am in the produce, fruits and vegetables.

Q. During the month of February, 1955, were you leasing a department at the Crystal Palace?

A. Yes. I was leasing two departments at the Crystal Palace.

Q. Would you give us the names?

A. I was leasing E. Gummow, Fruits, and W. Gummow, Produce.

Q. How many employees did you have?

A. Approximately, at the time, seven employees.

Q. Now, there has been some testimony in this

(Testimony of Warren Gummow.)

proceeding, Mr. Gummow, that there were pickets placed around the market on [210] February 15, 1955.

A. I think that is the right date. I am not sure.

Q. Now, can you tell us what occurred on that date, the first day the pickets were placed around the market? Did your employees come to work?

A. The first day the pickets—as I went down to do my buying early in the morning, I seen there was pickets in the Crystal Palace and I done my usual buying for my market and I came in and my employees were standing at the entry at the back of the Crystal Palace where the trucks go in to park to unload, and they were standing on the outside of the picket line there with the pickets.

I went inside my store, started to work as usual, set my counter up, unloaded my truck.

Q. Was anybody with you, any employee with you when you came in?

A. I had a fellow which I considered as clean-up man around the place of business, Jim Higgins. Well, he worked, he was a young kid, had no family, was kicked out, you know, in other words. I took him in, gave him a job, paid his room rent, room and board for him, and supported him along. In other words, he is not fully developed. His mind wasn't. A young boy, a Korean, a Veteran.

And he went in with me that morning to start work and he says, "Well, I help you with the counter this morning." [211]

(Testimony of Warren Gummow.)

So he was working with me on my counter at that time in the morning.

Trial Examiner Bennett: How many employees did you have?

The Witness: At that time?

Trial Examiner Bennett: At that time, how many at each operation?

The Witness: Well, in each operation, I had four at one operation and three at another.

Q. (By Mr. Magor): About what time in the morning was it that you and Jim Higgins were in the market? A. About 7:30.

Q. Tell us what occurred then?

A. Well, about 8:00 o'clock, after we had been working, I got my own merchandise off the truck. He was trimming cabbage, putting cabbage on the counter, and Pat Savin, of the Union, had came in the market and seen him at the time trimming cabbage and told him, "Drop that knife and get out. What are you doing back there?"

So the kid went out of the building.

Trial Examiner Bennett: Well, when did he leave?

The Witness: Right then when Pat told him to leave.

Q. (By Mr. Magor): Did he walk out with Pat?

A. No, I think he went out on his own.

Q. What occurred after that?

A. Then I finished my counter myself, set it up myself. I [212] was standing on the outside of

(Testimony of Warren Gummow.)

my counter talking with my manager at the time, against the doughnut shop.

Q. What was your manager's name?

A. George Andrews. We were discussing how long the thing would probably last and how long the strike would take and what to be done, and Pat come along and says, "George, you are not supposed to be here; come on, let's go."

So he went out of the back door.

Q. What occurred after that?

A. Well, later that afternoon, about possibly 2:30, he, Corsini, called me and asked me if my employees were working. I said, "No, because they are out on account of the strike." And he said, "Well, your men have a right to work. We have a contract with the Union that your men have to work. You get your men in and tell them to work."

I says, "I can't leave my stand. I am here alone. My men are on the outside."

I hung up and went back to my trade.

About an hour, two hours later, there had been a Union member go by that had worked for me previously on and off, Jack—can't think of the gentleman's last name—Hagopian.

I says, "Jack, do you want to work?"

He says, "I can't."

I said, "Well," I says, well, "my organization just called me and I have a permit for you to work and you have a right to [213] work."

I says, "The Union permits you to work," I said, "because we have a Union Contract."

(Testimony of Warren Gummow.)

He says, "You won't get me in trouble?"

I said, "No, you shouldn't get in trouble. They just told us you have a right to work."

So he says, "All right, as long as I don't get in trouble."

So he started working with me, gave me a hand. I'd say he worked with me for about an hour and then I was putting up tomatoes on my counter because my counter was run down, and Pat came in down by the liquor counter——

Trial Examiner Bennett: Pat who?

The Witness: Savin. And asked him, "What are you doing there?"

He says, "I am working," he says, "Warren has a permit for me."

He says, "Permit, Hell; he has no permit for you to work." He says, "Go ahead and work, but," he says, "I will black-ball you from the Union and you will never work in San Francisco again as a fruit man."

Pat went out the back door. The poor guy was scared to death.

Trial Examiner Bennett: Just tell us what he did.

The Witness: He tried to stay there, but he couldn't handle change, so I says, "Go ahead and work the rest of the [214] day." And he cleaned up the rest of the day, but he didn't come in next morning.

Q. (By Mr. Magor): Did any of your employ-

(Testimony of Warren Gummow.)

ees come to, return to work during the time that there were pickets—— A. Yes.

Q. ——pickets at the Crystal Palace Market?

A. Yes, because I was undecided. The Union gave me two of my men to help take down my counters, to move the merchandise out, because I had too much on hand. I was going to close down, but my loss was so heavy I couldn't afford to close down; so I opened up next day after moving everything out and then towards the end of the strike my wife had took very ill and I went to the Union. I called the Union and asked them for a man for help to operate my business because I couldn't close down.

And Mr. Goldenstein, I think is the gentleman's name, I called on the phone and he had let me have my manager to work so I could go to the hospital with my wife.

Q. When was this, as best you can recall?

A. I think it was the day before the strike ended, or two days before.

Trial Examiner Bennett: You said you couldn't close down?

The Witness: No, because I had perishable merchandise and it was decaying and I couldn't stand that kind of a loss.

Mr. Magor: You may examine. [215]

Trial Examiner Bennett: Now, this man you got for the last day, what was his name?

The Witness: George Andrews.

(Testimony of Warren Gummow.)

Trial Examiner Bennett: That was your manager?

The Witness: Yes, sir.

Trial Examiner Bennett: And I think you said that these prior incidents that you told us about took place the first day of the picketing?

The Witness: First day of the picketing.

Trial Examiner Bennett: That is all I have.

Cross Examination

Q. (By Mr. Davis): Mr. Gummow, did you give your employees any instructions on February 14, the day before the picket line went on?

A. Well, I actually closed one of my stands down. I closed the E. Gummow's Fruits and Vegetables down and I said, "Boys, no use coming in for that place because I am closing it down because I can't transfer merchandise after a strike from one place to another."

And then the boys at my regular place, I says, "You can come in," I says, "if you can work," I says, "come in." But that is all I said to my men.

Q. What did you mean "if you can work, come in?"

A. Well, if they can come through a picket line they can work.

Q. Do you have an employee, Mary Scardina?

A. Yes.

Q. Where does she work?

A. She works at W. Gummow.

Q. Is that the one you closed? A. No, sir.

(Testimony of Warren Gummow.)

Q. Did you tell her to come to work on February 14? A. Yes.

Q. You are sure?

A. Yes, because Wednesday is her day off.

Q. Well, the picket line went on on Tuesday, didn't it? A. That is right.

Q. So she would be regularly working?

A. That is right.

Q. You didn't give her any instructions the day before about coming to work? A. No.

Q. What time was it that this Jim Higgins went to work in the morning on February 15?

A. That special morning he had went to the market with me.

Q. What time was that?

A. I would say it was around six o'clock.

Q. You testified you have a contract with the Union? A. Oh, yes.

Q. What time are the employees supposed to report to work under that contract? [217]

Mr. Magor: Objected to on the ground it is immaterial.

Mr. Davis: Well, Mr. Examiner, it is——

Trial Examiner Bennett: Overruled.

A. They have to come in from nine to six, eight hours a day.

Q. (By Mr. Davis): So if the employees are required to come to work prior to 9:00, am., that is in violation of the Union Contract?

Mr. Magor: Just a minute. I am going to object

(Testimony of Warren Gummow.)

to that on the ground it is not the best evidence. The Contract speaks for itself.

Trial Examiner Bennett: In any event, it calls for a conclusion. I will sustain the objection.

Q. (By Mr. Davis): And what time was it that Mr. Savin came in on that morning to talk to Higgins?

A. I'd say approximately eight o'clock.

Q. Mr. Higgins was supposed to report to work at nine? A. No. There was no set time.

Q. You mean he can report—Well, what was his regular schedule?

A. His regular schedule was to clean up garbage.

Q. And what time did he start to work?

A. He had no set time.

Trial Examiner Bennett: Did he have a certain number of hours a day he was supposed to work?

The Witness: No, sir, because the gentleman, that kind [218] of a man worked when he felt like it. In other words, he come in, he worked, cleaned the place up, then he would disappear for three or four hours.

Trial Examiner Bennett: His only job was to clean up?

The Witness: Yes, sir, clean up. He would help me unload my truck. In other words, he would work on the outside of the stand, of the store.

Q. (By Mr. Davis): Well, what was he doing the morning that Mr. Savin came in?

A. Trimming cabbage.

Q. That is not called "clean-up," is it?

(Testimony of Warren Gummow.)

A. Yes, it could be clean-up, cleaning up the cabbage.

Q. Is that the job that he regularly performed?

A. No. Well, he has trimmed, yes. He trimmed out in the back of my produce stand, trimmed cabbage, celery, lettuce, cleaned up the bad merchandise to recondition it to good quality.

Q. Did you talk to Mr. Brodke that morning?

A. I think I met Al Brodke in the morning on my way to the market.

Q. Did you have a discussion about Higgins working? A. That I can't remember.

Q. You don't remember that?

A. No, sir, I don't.

Q. Would it refresh your recollection if I told you that Mr. Brodke said to you that Mr. Higgins wasn't supposed to be [219] working that early in the morning?

A. That I couldn't say, either.

Q. You don't recall whether he said that or not?

A. No, sir.

Q. But you do recall that you talked to Mr. Brodke that morning? A. Yes, I do.

Trial Examiner Bennett: Do you recall whether or not you spoke about Higgins?

The Witness: No, I don't.

Q. (By Mr. Davis): What was the name of this other employee that was working for you that morning? A. That morning?

Q. Yes.

(Testimony of Warren Gummow.)

A. I had no other employee that morning working.

Q. Oh. I am sorry. Did you testify about some other employee that Mr. Savin talked to?

A. Yes. Yes, I had—my manager was inside the store.

Q. When was this?

A. About 9:00 o'clock, 9:30.

Q. Same morning? A. Yes.

Q. What is his name?

A. George Andrews.

Q. What was he doing? [220]

A. He was standing there talking to me.

Q. Talking to you? A. Yes, sir.

Q. And Mr. Savin came up to you?

A. Yes, sir.

Q. You were both standing there together?

A. Yes.

Q. Who did Mr. Savin address himself to?

A. Mr. Savin says, "George, you are not supposed to be here. Let's go."

So they went out the back door.

Q. Was that all that was said?

A. That is all that was said.

Q. Mr. Andrews wasn't working at the time?

A. No, sir.

Trial Examiner Bennett: Could you tell us what time that was?

The Witness: Approximately 9:00 o'clock, sir.

Q. (By Mr. Davis): Now this Jack Hagopian

(Testimony of Warren Gummow.)

had not been employed by you prior to the picket line, had he?

A. He had worked on and off at times before. In other words, he would work as part-time help on Saturdays or Sundays; other help would take sick, myself or my wife would take sick, I would hire him.

Q. On Monday prior to the picket line, he wasn't working for [221] you? A. No, sir.

Q. When did you call him to work?

A. Approximately four o'clock that afternoon. That evening he was walking by my counter. I was by myself.

Q. That is the first day of the picketing?

A. First day of the picketing.

Q. Had you made any effort to call your regular employees? A. I couldn't.

Q. Why not?

A. They were on the outside of the market; I was inside.

Trial Examiner Bennett: You saw them on the outside?

The Witness: I saw them on the outside as I came in.

Trial Examiner Bennett: Your employees?

The Witness: Earlier in the morning, yes.

Q. (By Mr. Davis): How many?

A. Approximately three or four.

Q. What were they doing?

A. Standing there.

Q. They weren't picketing? A. No, sir.

(Testimony of Warren Gummow.)

Q. Well, did you make any effort during the day to reach any of your regular employees?

A. No.

Q. You saw Hagopian going by and you offered him a job? [222] A. Yes, sir.

Q. Did you call the Union?

Mr. Magor: Objected to on the grounds it is immaterial.

Trial Examiner Bennett: You may answer.

A. No.

Q. (By Mr. Davis): Mr. Gummow, when you wanted some help to take down your stand, you called the Union?

A. I called the Union next day when I wanted to move my perishable merchandise out.

Q. Yes. They complied with your request?

A. Gentleman by the name of Frenchie.

Trial Examiner Bennett: You spoke to Frenchie, or Frenchie came to work?

The Witness: No, sir. He was leader of the pickets and I talked to him about my Union to permit a man to come and take my counter down, my biggest lot of perishables.

Q. (By Mr. Davis): And then when you wanted George Andrews to come to work two or three days before the strike, you called the Union?

Mr. Magor: Just a moment. I want to object to that on the grounds it misstates the evidence. He says it was about a day before the strike ended.

Mr. Davis: I stand corrected, Counsel. Instead of two, it is one. Is that right?

(Testimony of Warren Gummow.)

The Witness: Between one and two days. I don't remember. [223]

Mr. Davis: O.K.

Q. (By Mr. Davis): Is it a fact you called the Union for Mr. Andrews?

A. I called the Labor Council, not the Union.

Q. Who did you talk to?

A. Mr. Goldstein.

Q. You called the San Francisco Labor Council?

A. Yes, Labor Temple, excuse me, Labor Temple.

Q. And who is Mr. Goldstein?

A. I think that is the gentleman's name. He is one of the three that is head of the Labor Temple.

Q. And what did he say to you?

A. He says, "If nobody is there by noon to relieve you," he says, "call me back."

Q. Did he indicate he would get in touch with Local 1017? A. Yes, sir.

Q. And then Mr. Andrews did appear before noon? A. Pat Savin brought him.

Q. Pat Savin? A. Yes. Within an hour.

Trial Examiner Bennett: Was there any conversation with Savin when he brought him?

The Witness: No. The only conversation was that I thanked him from the deepest of my heart for bringing him in.

Trial Examiner Bennett: How long did this Andrews work? [224]

The Witness: He worked the rest of the day. I don't remember if the strike was over the next

(Testimony of Warren Gummow.)

day. I don't remember if he worked one or two days.

Mr. Davis: That is all.

Trial Examiner Bennett: Redirect examination.

Redirect Examination

Q. (By Mr. Magor): Prior to the picket line going up, did you have any conversation with Mr. Brodke?

A. We had before, before the picket lines.

Q. And what did Mr. Brodke have to say?

A. I think Mr. Brodke had came in Saturday evening before the pickets, I think it was the 12th, and told us, he says there would probably be pickets Monday or Tuesday, and to buy light. That was approximately five o'clock Saturday.

Q. Was there any mention made about whether your employees would work or not?

A. Well, he says, "Our men will *expect* a picket line."

Mr. Magor: That is all.

Mr. Davis: No questions.

Trial Examiner Bennett: You are excused.

(Witness excused.)

Mr. Magor: I would like to mark for identification purposes as General Counsel's Exhibit 30 the Constitution and By-laws of Local 648, and I will hereby offer it in evidence at this time.

Mr. Davis: No objection. [225]

Trial Examiner Bennett: It may be received.

(Thereupon the above-mentioned document was marked General Counsel's Exhibit No. 30 for identification and was received in evidence.)

Mr. Magor: General Counsel rests.

Trial Examiner Bennett: I have in mind that I reserved ruling on one of your exhibits, GC-11.

Mr. Magor: I believe that is the only one you have reserved ruling on.

Trial Examiner Bennett: All right. General Counsel rests.

Mr. Davis: At this time, Mr. Examiner, I move on behalf of the Respondents that the Complaint be dismissed, and in support of that motion I have the following comments to make:

I suggest that this is a Complaint, Mr. Examiner, that was ill advised in the first instance and should never have been authorized by the General Counsel's Office.

I suggest and submit further that having been nevertheless issued the allegations in the Complaint have—there has been an utter failure to prove the allegations in the Complaint.

My suggestion that the Complaint should not have been issued in the first place is based upon the clear facts developed in the Counsel for the General Counsel's own case that if ever there was an instance of a primary boycott, a primary strike conducted against a primary employer in the retail [226] industry, retail field, this is one.

We have a situation where an Employer has a primary dispute with a Union representing his Em-

ployees, or some of them; owns and operates a large establishment, a market in which in its every phase this primary Employer, J. M. Long Company, is most directly and fundamentally interested.

By the diagram that was introduced in evidence by the Counsel for the General Counsel, and by the testimony of the Employer representing the J. M. Long Company, we see that the Crystal Palace Market operated by the J. M. Long Company consists of a large free parking area in the rear, and, within, its premises consist of a number of departments directly operated by the J. M. Long Company, adjacent to every entrance of that market, the market being entirely owned by the J. M. Long Company.

At the front entrance on Market Street the J. M. Long Company operates the magazine, tobacco and liquor departments.

At the Stevenson Street entrance, the J. M. Long Company maintains its carpenter shop and its general offices from which the executives conduct the entire market.

From the Jessie Street entrance, the J. M. Long Company operates a grocery warehouse and a grocery department.

In the rear the entrances are for the purpose of the customers entering the Crystal Palace Market for purposes of trade with the J. M. Long Company and its affiliates in the [227] various departments which I will discuss in a moment.

On the 8th Street entrance—well, before leaving the parking area entrances, in addition to customers

entering for the general purposes in the market, there is also operated directly by the J. M. Long Company the liquor and tobacco departments and various warehouses which they use apparently themselves, as well as leasing space to or permitting some of its sub-operators to use the space.

On the 8th Street entrance, also for the general public to enter the entire market, there is operated the Standard Groceteria which is another sub-operator of the J. M. Long Company and is an organization with which Local 648 had again a primary dispute.

Now, in addition to the fact that the customers and the J. M. Long Company uses all of these entrances, also the testimony shows that all of the employees use all of these entrances at all times, so that when the pickets were placed at all entrances, they were engaged clearly in a primary dispute with the J. M. Long Company, the owner and operator of the Crystal Palace Market.

Now, in addition to the fact that all over the market the J. M. Long Company operates directly, one of the primary features of this case is that here we do not have, as alleged in the Complaint, any independent, neutral Employers. In each department operated by the J. M. Long Company in the [228] Crystal Palace Market there are so-called tenants, but the J. M. Long Company is most directly and vitally interested in the business of these so-called tenants and in no sense of the word can these people be called secondary Employers or independent operators. These so-called tenants are operating their

part of the Crystal Palace business for the J. M. Long Company on behalf of the J. M. Long Company. This is nothing more than a device for the purpose of the J. M. Long Company to gain its profit from the operation of the various so-called separated businesses in the market.

Trial Examiner Bennett: Your point is, if I follow you, that the Clerks' Union, or rather——

Mr. Davis: 648.

Trial Examiner Bennett: ——648, had a dispute, a primary dispute with Long and a group of people who were associated with Long?

Mr. Davis: That is correct. As I have pointed out, directly, there is no question, no possible question, and it isn't even alleged that 648 did not have the right to picket the J. M. Long Company as it did with its signs and to picket not only with respect to the Employees, its members who had been locked out of their employment in the particular grocery departments, but, also having a primary dispute with the J. M. Long Company, Local 648 certainly could picket to persuade customers and the general public and the Employees of the J. M. [229] Long Company, as far as that is concerned, but to patronize or engage in business with the J. M. Long Company at its liquor department in the rear, and its tobacco department in the rear, at its tobacco, liquor and magazine stands in the front, and any other operations directly operated by the J. M. Long Company where the J. M. Long Company had Employees. Certainly that cannot be said

to be a violation of the law and there are no allegations that it is.

Trial Examiner Bennett: This is the emphasis of the Complaint directed——

Mr. Davis: I was first pointing out that the nature of the picket line and the fact that the signs clearly indicated from the beginning, and there is no real conflict on this, that Local 648 had a dispute with the J. M. Long Company, by picketing all of its entrances, it had a right to do that in order—for purposes I have stated—to cover all of these entrances and the Employees, with respect to the Employees of the J. M. Long Company and the public dealing with the J. M. Long Company everywhere where the Long Company is directly operating the market.

So this question of picketing all entrances was obviously in pursuance of a primary dispute.

In addition, the point I was making is that we have here not even joint venturers, where they are clearly not neutral Employers, but we have an even stronger case that these so-called [230] operators that I referred to in the Complaint were members of this Fruit Association, were in fact doing business for the benefit of the J. M. Long Company. Just as the J. M. Long Company in its—let us say, for example, its liquor department in the rear, was making a profit from the operation of that and Local 648 had a right to advertise its dispute and if it in any way could hurt the business of the J. M. Long Company, in the same way it had a right to hurt the business of the J. M. Long Company oper-

ated through these so-called independent operators. So, we don't have, as I am pointing out, a case of an independent or neutral Employer being—where a boycott is prosecuted against a neutral Employer to cause him to cease doing business with a primary Employer. And of course on that point I will point out no business was being done, so obviously the provisions of the Statute aren't met on that point, but, regardless of that, my point now is that we do not have the case of a neutral Employer, we have the case of sub-businesses or sub-departments of the primary Employer suffering as the result of a primary boycott against a primary Employer, and that is a legal attempt to cause loss of business in the course of a primary strike.

Trial Examiner Bennett: You claim that the relationship between Long and the operators of the grocery stands is different than the relationship, say, between an Employer and a construction company doing business on the premises of the [231] construction company?

Mr. Davis: Most definitely.

Now, I would like to, in furtherance of the point that this is a Complaint which should never have been issued because of the points I have made, and this further point, the fact of the matter is that in the retail trade the only effective way of picketing is to picket publicly on the sidewalks and entrances to a retail business in order to dissuade the public from patronizing the struck Employer or the Employer with whom the labor dispute exists and to encourage them to trade elsewhere. That is a tradi-

tional and the method for the retail clerks' organizations to picket and the only effective way that they may picket, and as this Examiner has pointed out for the record this was a market located on Market Street in San Francisco where there is a large segment of the public passes back and forth on Market Street to trade in various retail establishments along that street and it was obviously reasonable and necessary for Local 648 to picket on that basis, to advertise to the public its dispute with the J. M. Long Company.

Now, if this theory were to be adopted—and this is the first time there has ever been even a Complaint issued, to my knowledge, on such a theory as this—in the retail trade we would have a situation where the right to strike and to picket by retail labor organizations would be effectively limited, if not destroyed, if not destroyed altogether. Not only that, but [232] we would have a further restriction beyond the clear intent of Congress when it adopted the Taft-Hartley Act to restrict and limit the right of a primary strike.

Let us take a few examples to show what I mean.

Let us suppose that the Shell Building, which is a major building here in San Francisco, and in which the Shell Company maintains offices and leases space to other employers, had a dispute with the Office Workers' Union and the Office Workers' Union placed pickets in front of the Shell Building. Does that mean that these other employers who lease space in the Shell Building could go to the National Labor Relations Board and secure action

by the Board to enjoin and prohibit such picketing because of the fact that they happened to also do business in that office building and pay rent to the Shell Company?

Now it is—and I will come to this matter of going inside in a moment—but let us take the, continue this example of the Shell Building. Does this mean, on the General Counsel's theory, that these pickets may not picket the entrance and advertise to the public that the Shell Company is unfair? And I am simply using Shell as an example; I have nothing against Shell Company at all and I don't think Organized Labor does, at the moment at least. Does that mean that these pickets must be invited inside, or, if they are invited inside, they must patrol some of the corridors in this great office building in [233] front of particular offices that happen to be operated by the Shell Company?

Now that, of course, would be to effectively destroy the right to picket and engage in a primary boycott if that kind of theory were adopted, and that seems to be the General Counsel's theory in this particular Complaint.

Now, we can apply that to the Retail Trade further. The Emporium is a large department store in San Francisco. Macy's, a national organization, operates a large department store in San Francisco. I think judicial notice can be taken of the fact that the customary method for retail department store operation is not to operate the entire store itself but to lease out concessions to various departments. There are millinery concessions, there are beauty

parlor concessions, there are innumerable types of concessions that are operated in large department stores.

These, on the General Counsel's theory in this Complaint, would be independent, separate Employers, and we would be faced with a situation where the Retail Clerks could neither have a dispute with these concessionaires, a primary dispute, nor with the department store itself under which it could effectively picket on the public streets and sidewalks adjacent to the premises of that Employer, but would be required to mill around—and I will come to that point in a moment—mill around in the aisles adjacent to the particular department [234] that the General Counsel chose to decide was independent within the premises of one of those large department stores.

We can apply the same thing to these new shopping centers that are developing all over the country. We would have a chaotic situation if this kind of theory were to be adopted.

Trial Examiner Bennett: As you know, the Board has treated with this type of problem in the line of cases called common situs picketing situation.

Mr. Davis: I am coming to that. I want to show the distinction between common situs situation and retail trade where we have a situation where the public must be advised on the public streets in front of the general premises of the Employer of the fact of a labor dispute and they differ materially from the cases such as Moore Dry Dock, which I will

come to in a moment, and I will show even on the common situs cases this theory will not stand up, even were the analogy to be applied.

Trial Examiner Bennett: I agree that most of the common situs cases that the Board has treated with have been cases where the other Employer has been on the premises on a temporary or semi-temporary basis. I don't recall any offhand, any cases, where it has been a permanent established relationship.

Mr. Davis: That is correct. [235]

Finally, just to show the evil of this kind of a theory, it would be a relatively simple matter, were this theory to be accepted in this Crystal Palace case, for every retail Employer of any size to operate in the same manner that the J. M. Long Company decides to operate. It could lease—a large Employer could lease all of its departments simply as a device to prevent the effective carrying on of a labor dispute with the labor organization with which it deals.

Again, the Emporium, Macy's, any of those operations could change, in form only, the method of their operation so they technically lease to the men's clothing department, they lease that out to an individual who pays a minimum fee plus a percentage of his profit plus a percentage of his gross, it is not profit, so that the primary Employer is assured of always doing well and the so-called lessee has to scramble for whatever compensation he may gain out of this type of enterprise, but the point being that there is nothing to prevent any Employer in

the retail trade from following exactly the same theory that is advanced here as a novel idea by the General Counsel's Office in its Complaint.

Now, turning for a moment to this matter of the common situs cases that the Examiner has just pointed out, there are no cases, to my knowledge, where situations have arisen where permanently a so-called secondary Employer operates on the same premises and throughout and intermingled with the business [236] operations of the primary Employer, and of course there are no decisions by the Board which come close to the factual situation here.

However, there are some cases, on the other hand, which indicate that even on the theories thus far developed by the National Labor Relations Board in these common situs and roving situs cases, that this theory is not supportable, and I refer to the—in one instance, to the Electrical Workers, the Ryan Construction Company case, in which there the Ryan Construction Company was building an addition to the primary Employer's plant, and the Union had a dispute with the primary Employer who operated the plant, the Bucyrus Company.

Trial Examiner Bennett: I am familiar with the Ryan facts.

Mr. Davis: I just want to call the Examiner's attention to the language used by the Board, which applies most aptly to the instant case:

"When picketing is wholly at the premises of the Employer with whom the Union is engaged in a labor dispute, it cannot be called secondary even

though an object is to dissuade all persons from entering for business reasons."

All persons from entering for business reasons, and the Board stated that 8(b)(4)(A) of the Act is intended only to outlaw certain secondary boycotts whereby the Union sought to enlarge the economic battleground beyond the premises of the primary Employer, and it obviously cannot be contended that the [237] premises of the primary Employer in our case was not the Crystal Palace Market.

Mr. Haag's testimony is too clear on that and the facts are too clear that the entire premises are the Crystal Palace Market, and, as I pointed out, clearly Local 648 was entitled on all theories to picket the entire premises.

Now, there is a most recent decision of the Board which the Examiner may not have had time to review, since it was only issued on April 21, 1955, and only appears in my NCCH for the issue of May 19, 1955. I refer to the matter of the Teamsters and Crump & Corporation, 112 NLRB, No. 49, Case No. 6-CC-94, and the facts in that case were similar to the Ryan Construction Company case in that the primary Employer was Kaufman's Department Store.

Here we have operated under the title of May Department Stores, Kaufman Division, and here we have a retail trade case. The contractor was building again an annex or an addition to the premises of the primary Employer, and the facts were that this annex was located on a separate, small public thoroughfare known as Cherry Way in the

City of Pittsburgh, and Cherry Way led directly into the construction company's project of the annex and its sole use was an entrance to the project. It was the only entrance used by the construction company employees and it was not used by Kaufman's employees in any manner.

And under the terms of the contract between Kaufman and the contractor, Crump had exclusive control of the project site [238] and Cherry Way, and Crump had a field office across Cherry Way from Kaufman's main store.

At the southern limit of the construction there was an alleyway used in making delivery of materials to the project.

Now, the Teamsters had a—the Union had the primary dispute with the department store and they picketed the entrance used exclusively by the contractor Crump, Cherry Way, and so on.

Now, for other reasons, the Board held that there the Union had engaged in a secondary boycott because of directly inducing Crump's employees to cease work and so on, but coercion and encouragement and so forth, the usual thing. But, significantly, the Board did not hold that the Union did not have the right to picket the entrance to the project which was the exclusive, under the exclusive control of the contractor and which was physically separated from the entrances used by the primary Employees of Kaufman's.

Trial Examiner Bennett: Didn't the Board look at the surrounding factors to determine whether there was a primary or secondary—I should say a

secondary objective in addition to the primary objective?

Mr. Davis: Yes, certainly, but the theory here in this case is, as far as Local 648 is concerned, that because it picketed all of the premises of this Employer, instead of just going inside and parading up and down a few aisles in front of [239] J. M. Long's grocery, that that made it a secondary boycott. I am pointing out, as far as that is concerned, this most recent case indicates that that is not the Board's view; that the picketing certainly could take place not only here as it did all around the premises, but specifically as to the entrance used only by a second—so-called secondary Employer.

So, even on the theory that the Board has developed in other common situs cases, this case is not supported. And, of course, as the Board has also pointed out in numerous decisions with which this Trial Examiner is clearly familiar, in no case, to my knowledge, has there ever been a decision that picketing was secondary in a common situs case where the premises are wholly used by both the primary and secondary Employers. And clearly the testimony and the evidence here is that there is no restriction on these premises. The employees of all of these employers, whether they be designated secondary, as the Complaint does, or primary, use all of these premises. They use all of the entrances, they use warehouses all around the premises, they use the parking area. The public uses for their business all of the entrances. So, this is clearly a case of the

common use of the premises by all of the Employers involved here.

Trial Examiner Bennett: I have read the Crump decision you have referred to, and it strikes me, although the majority in that decision does not say so, that it is to some extent [240] inconsistent with the Ryan case you cited. In fact, a dissent in the Crump decision so claims. But that is a matter for the Board to decide.

Mr. Davis: Well, of course, under our rule, in our system of justice, the dissent is not entitled to the weight of the decision. It is the majority view that we must follow.

Obviously, in many of these cases that went against the Union's theory, there were dissents in favor of the Union, so I think that the Board's rule is clearly determined by the majority view, and, if it be inconsistent, then it must be considered that the Board has revised its thinking with respect to this matter of secondary boycotts.

In any event, it has not come close to going in the direction that the General Counsel's Complaint would have this Trial Examiner rule and there are no decisions supporting this view.

Now, I want to finally take a few moments to review just what the General Counsel's Office has failed to prove here.

Trial Examiner Bennett: I should have said the Crump opinion has a dissent and also a special concurrence.

Mr. Davis: Yes.

Trial Examiner Bennett: And it is the special

concurrence which makes reference to the Ryan decision.

Mr. Davis: Oh, yes.

Now, the evidence here is, to put it generously, scanty. [241] We have the testimony of Mr. Tissier, who is Secretary of the Retail Grocers Association, which didn't establish anything except the formal allegations of the Complaint with respect to the nature of the Retail Grocers Association and the nature of its bargaining with Local 648. Beyond that, there is no evidence to support any of the charging allegations of the Complaint.

Next we have Mr. Haag's testimony, the General Manager of the Crystal Palace Market and the J. M. Long Company. He testified as to his duties, which were to supervise the operation of the market, all of its features, see to it that the terms of these so-called leases were lived up to, check the gross made by all of these departments and collect the necessary money, and so on, and various duties.

He has an office in the building from which he sees the entire operation of the market and supervises it. Pretty clearly, he is in charge of everybody doing business of any kind in that market.

Sixty-four leases — Long owns the ground and building. And then he gave us this diagram of the premises. And in that connection, or rather—Withdraw that.

In connection with this particular dispute, some of Mr. Haag's testimony is extremely interesting to the issues in this case as to the control exercised by the Crystal Palace Market and the J. M. Long

Company over its so-called tenants, and to [242] the point of lack of any real independence on the part of these so-called, these Employers so-called that the General Counsel's office chooses to call "independent" in the Complaint.

Mr. Haag testified in this connection about a meeting that he held with a number of these tenants who had dealings with Local 648, and the language he used was that he instructed them that under no consideration would he permit them to operate on Monday if they decided not to sign with the Union. Now if Mr. Haag has that kind of control over those particular so-called lessees, there is evidence that all of the lessees have almost identical leases, then he has the same kind of control over every tenant so-called in that building, including these so-called secondary employers who are members of the Fruit Association. He can tell them to open or close or to operate in whatever manner he deems is to the best interest of the Crystal Palace Market. That is very clear from Mr. Haag's testimony, and he actually seemed to be proud of that fact that the Crystal Palace Market did really run the whole market. They handle all the advertising for all of the so-called tenants and they, in every sense of the word, are the managers and operators of all of the departments in the Crystal Palace Market.

Now, in connection with this matter of picketing, and the discussion with Mr. Jinkerson, according to the testimony that is here now, Mr. Haag said that he would be happy to [243] contact Mr. Tissier and try to work these disputes out. Mr. Jinkerson had

complained about the fact that these markets were opening and closing daily, which Mr. Haag admitted, and that this was a situation that was causing confusion and couldn't be any longer tolerated by the Union, that there had to be some kind of a settlement by the Crystal Palace Market or they would have to be—there would have to be pickets placed at the market.

Now, Mr. Haag said in that connection that, in passing, that the Union had full permission to come inside. Apparently there was no further discussion on that. Mr. Haag says that Mr. Jinkerson simply replied that wouldn't give him the economic strength he needed. That is perfectly obvious that it wouldn't, as I have already discussed, assuming Mr. Jinkerson said that, and we are arguing on the basis of the evidence that is here. Certainly Local 648 needed economic strength to picket the entrances where all employees came in and out, where all customers came in and out. That clearly was what Local 648 was interested in, and it proceeded then to make it clear by the nature of its picketing, posting signs, "The J. M. Long Company is Unfair to Organized Labor," with its name, Retail Grocery Clerks' Local 648.

Now, however, let us assume that there was such an invitation, valid, real invitation to come inside the market and picket, and that it was refused as the Complaint alleges. [244] Merely by taking a look at the diagram, General Counsel's Exhibit 19, and coupling that with the testimony as to the general size and nature of this market, it is clear that

this kind of picketing could not possibly be effective or proper in the case of a primary dispute with the J. M. Long Company as Local 648 had.

The testimony is that these aisles are from six to eight feet wide. By simply looking at all of the departments here, we see that utter confusion would be created by pickets parading up and down in certain areas—what areas we don't know—there is no —Mr. Haag didn't make any specific invitation that you may come and picket at this particular area; he just said you can come inside, according to his own testimony. That is all he said, according to his own testimony.

Well, what does that mean? Does that mean pickets of Local 648 may parade all around in all of the aisles which are owned and operated and under the control of J. M. Long Company. Every aisle is. It is the stands that are leased out.

Is that what that means, that pickets may weave in and out among the customers or weave in and out among the employees, carrying their signs and banners, or may they picket around the tobacco department, which is operated directly by J. M. Long Company, at the entrance where people enter, for tobacco and liquor departments, or at the truck entrance, or may they picket around the tobacco and magazines and liquor stands at [245] the front end of the market on Market Street?

And, if that is the case, may they picket across the front of the entrance on the sidewalk instead of having to walk inside?

May they picket on the Stevenson Street entrance

which is adjacent to J. M. Long Grocery Department? Inside, or may they step outside and picket in front of the entrance where the customers enter for that purpose?

The same thing at the Jessie Street entrance. May they picket inside the aisles, inside the premises in these aisles which are adjacent to the steam beer and fish-poultry department, and, if so, carrying signs and picketing around the grocery department which is adjacent to the steam beer, fish and poultry, the bulk foods, the flowers and nursery, and the cheese and eggs departments?

It seems that according to the General Counsel's theory the signs don't help them any; if they are in any way interfering with or causing employees not to cross picket lines then this is a secondary boycott.

By what stretch of the imagination or upon what theory would pickets marching in the aisles in front of the J. M. Long Grocery Company not be engaging in a secondary boycott around the cheese and eggs department which is just right there, it is two or three feet the other side? Maybe the employees of the cheese and eggs department would think that was a picket [246] line which they, as Union members, didn't want to cross. In that case, has Local 648 engaged in secondary boycott even though they're inside the market?

You can see, Mr. Examiner, that all kinds of ridiculous situations could occur in which, if this theory were adopted, the General Counsel's Office would be engaged in a multiplicity of Complaints

of all kinds from now on in any large market, in *any the* large department store, any large shopping center where we have this kind of a situation. And this certainly is not unique. This is a method of operation in the retail trade that is fairly common.

So if, as I suggested to Mr. Haag, Mr. Jinkerson replied, "How ridiculous can you get?" I think that probably was, on the basis of the facts and all, was a pretty apt reply. The evidence here doesn't show that, but nevertheless if he had said that, we can understand why he would have so reacted just on the basis of what we see the situation here to be.

Now, beyond that, we have really nothing. On the matter of the so-called coercion and influence on the part of agents of Local 1017 with regard to whether its members should cross a picket line, again there is nothing to support the charge or charges that are set forth in the Complaint. We have in that connection nothing, of course, from Mr. Haag or Mr. Green, although Mr. Green again indicates the control which the Crystal Palace Market exercised over the operators. [247]

But in the case of Mr. Donabedian, he testified that his employees were told by him if there were no pickets then come to work. So that is the kind—and his employees didn't come to work—so there is no testimony by him that there was any coercion or inducement or illegal encouragement on the part of the representatives of Local 1017 to prevent his employees from coming to work. They just didn't show up because there was a picket line, which is their right, which is their right under the law.

Now, Mr. Corsini's testimony, of course, doesn't go into that at all. He had no knowledge of anything like that. He simply testified about his relations with the Union through his association and some vague testimony about telephone conversations with Mr. Brodke, which add up simply to the conclusion by Mr. Corsini that if Mr. Brodke didn't give him cooperation that he would have to take further action, in other words, threatening Mr. Brodke with some kind of action if Mr. Brodke didn't order his members through the picket line, which, of course, he had no duty to do, which incidentally, as the contract which is in evidence with Local 1017 and the Fruit Dealers shows, that the employees are entitled to observe the objects or obligations of their Union and the Labor Council with respect to Union matters such as this.

Now, one point on Mr. Donabedian, there was testimony that he got a picket line on his truck down at the produce market, [248] and it is pretty clear why he did. He had, in violation of the contract which is in evidence, attempted to hire Mrs. Misuraca as an employee after having told his own employees not to report to work if there was a picket line, pretty clearly in violation of his contract. And there the Union had a perfect right to take the action that it did take.

Now, with respect to Mrs. Misuraca's testimony, there again there is nothing to support the charges in the Complaint. She testified that she had conversations with Mr. Lyons and Mr. Savin and Mr. Brodke over coffee one morning, in which they ad-

vised her, in an effort clearly to try to help her, that there would be pickets and she might not be able to operate because her employee wouldn't come through the picket line. There clearly is no violation of the law there nor any indication of any intent to violate the law.

She testified that she knew Hagopian wasn't going to report to work, her employee. How did she know? She knew he wasn't going to cross the picket line, not because of any evidence of any coercion on the part of the Union agents but simply because there was the picket line there, and he wasn't going to go through it.

And her other testimony about her conversations with this picket captain Frenchie have absolutely nothing to do with any of the issues that are set forth in the Complaint and raised by the Answer.

The matter of the sign was pretty well taken care of when Respondents' Exhibit 1 was introduced and Mrs. Misuraca conceded that the only time she used that sign in her own picketing was the first morning of the picketing, and the sign showed it was the J. M. Long Company that was being advertised as unfair.

So, the one slight doubt she raised by her testimony as to the signs was clearly removed by that evidence.

Now, with the final witness, Mr. Gummow, again no evidence which is sufficient to support the allegations of the Complaint and those allegations in the Complaint itself should therefore be dismissed.

He talked about a Jim Higgins who he called a

clean-up man and obviously there he had ordered, instructed that employee to come to work and to work that morning in violation of the Union Contract which is in evidence and shows that employees may not be required to report to work before 7:00 o'clock in the morning, and his testimony is that he had him working at 6:30 that morning.

Obviously the Union there had a right to go in and take the action that it took because of this Employer's violation of his contract.

The conversation with Mr. Savin and this manager, George Andrews, about 9:00 a.m., certainly doesn't indicate anything very serious. Mr. Savin said, "You are not supposed to be [250] there." That certainly can't be construed as being coercion or unlawful inducement. If he is a Union man, he is not supposed to be working. As a Union man, he knows that. He was simply reminded of his Union obligation.

In no decisions that I know of has that been held to be an illegal coercion.

And the Union's desire to be cooperative and to help Mr. Gummow and all of these Employers at all times is further affirmed by Mr. Gummow's testimony that later on some of his employees did report back to work to help out Mr. Gummow, and he indicated his gratitude that that had been done.

Mr. Brodke's statement to Mr. Gummow, again, as to Mrs. Misuraca and Mr. Donabedian, was an attempt to help out the Employer by advising him in advance that there might be picket lines which would cause his employees not to come to work and

that our men will respect the picket line. That is simply a statement of fact which was proven, that they did respect the picket line, and he was advised to buy lights so he wouldn't suffer an economic loss. Surely that kind of conversation cannot be held to be unlawful inducement or encouragement of employees not to work for a so-called secondary Employer.

So, all in all, we have, as I have indicated, a set of testimony and evidence which is so flimsy as to indicate that the General Counsel's Office—and it must have had knowledge of the type of case it had in the beginning—it clearly [251] should not have ever issued this Complaint, and all of those considerations, if ever there was a situation, Mr. Examiner, where a Complaint should be dismissed at this stage in the proceedings, I submit that this is it. There is no possible case on the basis of the theory advanced by the General Counsel's Office and no possible case on the basis of the evidence introduced to support what is an erroneous theory in the first place.

So, on all counts, we submit that our motion should be granted.

Trial Examiner Bennett: Before we proceed further, there is one point that occurs to me, and I would like to see it developed for the record. I believe it lends itself to stipulation.

We have had testimony that some of the grocery departments belong to the Grocery Association and are under contract with 648, and that the same is true with respect to produce departments belonging

to the Fruit Dealers' Association, being under contract with 1017. There were a number of stands that were not touched upon, such as meat, housewares, appliances. Can the parties stipulate that those Employers, or lessees, whatever you want to call them, belong to different Associations or are unorganized or do business with other Unions than those involved here?

Mr. Davis: I should think we could. [252]

Trial Examiner Bennett: I don't want to know precise details, just the general picture.

Mr. Davis: Well, as we know the picture, Mr. Examiner, there are many other Unions who have relations with the operators of the Crystal Palace Market in one form or another and are employed within the premises of the market, under Union Contract.

Now, I don't know anything about the Association side of it. We just know the Union side.

Trial Examiner Bennett: Is that agreeable to you?

Mr. Magor: From what I understand from talking to Mr. Corsini, there are various other Associations, such as Meat Dealers Association, Retail Butchers Association, Retail Liquor and Restaurant Association.

Mr. Davis: And many others; and the facts further are that the employees who are members of these other Unions employed on the premises of the Crystal Palace Market also respected generally the picket lines that were there. There were some exceptions.

Mr. Magor: I can't join in the latter part of the stipulation.

Trial Examiner Bennett: Well, the parties can stipulate, in any event, that there are other concerns doing business there who are not members of either of the two Associations involved herein, and whose employees in part at least do not [253] belong to either of the Locals involved herein. Can that be stipulated to?

Mr. Magor: I will stipulate to that.

Mr. Davis: We will stipulate that there are other operations in the Crystal Palace Market. We question whether they are other firms doing business.

Trial Examiner Bennett: Other operations, lessees, is that agreeable?

Mr. Davis: Yes.

Mr. Magor: That is agreeable.

Trial Examiner Bennett: So stipulated.

Do you wish to be heard on this?

Mr. Magor: Yes, I do.

Mr. Trial Examiner, as I understand it, in the motion we are arguing only the facts of the case that are brought before you on the burden of proof of the General Counsel to establish a prima facie case. We are not arguing some other case. We are not arguing some other retail establishment. We are not arguing about the Shell Building. We are talking about the Crystal Palace Market, the Complaint, and the evidence adduced by the General Counsel with respect to showing that a violation existed.

Now, Counsel has mentioned the retail department stores in town, and, in view of the fact that he has, I will direct your attention to the facts and the law concerning them, particularly [254] the Board decisions, which I don't have at hand at the present time, but there has been—as far as a lessee and a lessor distinction has been made, the Board has had occasion to pass upon it, and they find that the joint operation does not exist unless the lessor has complete control over the labor policies of the lessee. And the cases that I am mindful of are those in which the lessor, the department store, runs the operation of interviewing the personnel to be hired by——

Trial Examiner Bennett: Are these cases on unit?

Mr. Magor: They are on unit cases.

——personnel to be hired by the lessee, the concessionaire, within the department store. They govern the hours of work of the employees; they are all paid by the payroll check of the department store.

Other than that, the Board has strictly followed, nor can they reach any other conclusion, than to follow the facets of the law with respect to lessor and lessee agreements. That was brought sharply home particularly in the contractor situation by the Supreme Court decision in the Denver Building Construction Trades Council case. There is no showing in that case, other than the fact that these concessionaires within the Crystal Palace Market are lessees, are tenants of J. M. Long. The facts cannot be

questioned that the employees, particularly the employees with which we are concerned in this matter, the employees of the members of the Fruit Association, were represented by an entirely different unit or Union, Local 1017. [255]

Now, there is one point that Counsel did say, one statement he did make with which I agree. He said that Mr. Jinkerson who replied, in his reply to Mr. Haag, when he asked him to come inside and picket the effective establishment, stated that, at least from the testimony of Mr. Haag, that that would not give him the economic pressure he desired. And, as Counsel states, obviously it wouldn't give him economic pressure he desired.

Mr. Davis: The record will show it is "economic strength." Mr. Haag corrected me when I used that word.

Mr. Magor: They were interested in picketing all entrances where employees come in and out. I agree with that statement. If they were given a license to come inside the Crystal Palace Market and picket the effective establishment, and Jinkerson's reply was, as corrected by Counsel, they would not be given the economic strength they wanted.

Well, what was the economic strength they wanted? If they picketed inside of the effective establishment, the J. M. Long Groceteria and Standard Groceteria, as their signs indicated, members of the Association with whom they had the primary dispute, obviously employees, members of Local 1017, would see that they were picketing inside and there was no dispute with their own Employer, and

would have gone to work, these neutrals in these matters, Gummow's, Rose Ann, Peninsula Fruit and Nu-Way Produce, and the members of the Fruit [256] Association.

They were given a license to picket inside and they refused because it would not give them the economic strength that they wanted.

Now, to meet the criteria of the common situs picketing with which we are concerned here—and while on that point I have also read the Crump case, and there is one distinguishing feature in the Crump case, the Employer did not ask them to come down and picket close to where the dispute existed.

Here, Haag asked them to come in and picket the effective establishment. The criteria established by the Board is met, are as follows:

One, that the picketing must be strictly limited to the time when the situs of the dispute is located on the secondary Employer's premises.

Two, at the time of picketing, the primary Employer is engaged in its normal business at the situs.

Three, that the picketing is located at a place reasonably close to the location of the situs.

And, four, that the picketing discloses clearly that the dispute is with the primary employer.

In the instant matter, the primary employers, as disclosed by the picket signs, are J. M. Long and the Standard Groceteria, and both Long and Standard Groceteria at that time were not operating the grocery departments in the Crystal Palace Market. [257] They closed them down since February 3,

1955. They didn't have any employees working at the time. The fact is, the employees were laid off.

Trial Examiner Bennett: Is it your point that the picketing should cease when Standard and Long closed down?

Mr. Magor: No. I am not contending the picketing should cease. Certainly I am not questioning the fact that the Union having a primary dispute with an Employer can picket and advertise to the public. That certainly is a right under this Act and it is right under Court decisions.

But my point is that we have to get at the object of the picketing or who they were putting the pressure on.

Trial Examiner Bennett: It is your point that they, the fact that they picketed——

Mr. Magor: Outside all entrances, including driveway entrances and warehouse entrances and the parking area entrances, showing they were putting pressure on these neutral Employers and Employees. That the picketing should have taken place inside at the operations of Standard and J. M. Long.

And the evidence as indicated by Mr. Haag shows that there were spots in there that they could have picketed, that there were entrances or turnstiles for entering both J. M. Long's operations, the grocery department in there, as well as Standard Groceteria's operations, and that the aisleway was sufficiently clear and gave sufficient room for pickets to [258] station themselves inside and advertise to the public or to whomever they wanted that they

had a dispute with those two members' departments, those were the members of the Association.

Now, with respect to Local 1017, we will take up another point that Counsel has raised, and that was that Mr. Savin came in and talked to Mr. Gummow's manager and said, "Come on, get out, you are not supposed to be working here." As he states, the Union man was not supposed to be working. But we are dealing with Section 8 (b) (4) (A), and the words "induce" and "encourage" are very broad. "Encourage" is a very broad term. As one Court has stated some years past, when the Taft-Hartley Act was first enacted, it can be as much as a wink and a nod, and that was just what Pat Savin was giving to the manager. You are not supposed to be working. We are encouraging you to come out on the outside and obey this picket line.

Let us take the other instance just testified to this morning by Mr. Gummow on the stand. Here comes this man Hagopian in to work. He is working for an hour. In comes Pat Savin and says, "You can continue to work in here, but if you do I will black-ball you so you will never be able to work in a Union shop again as a fruit man." That is not only inducement and encouragement of an employee with respect to a picket line, it is a violation of Section 8 (b) (1) (A) because it restrains and coerces employees in their right under the Act to engage in concerted activity or not to engage in concerted [259] activity, depending on their own choosing.

We can go further than that. We can take the statements testified to by three or four witnesses that prior to the time that the picket line was established, Pat Savin or Brodke came down in the aisles of the store and talked to the neutral Employers, members of the Fruit Association, and told them that a picket line was going up and my members will not cross that picket line.

Now, what inference can the Trial Examiner reasonably draw other than the fact that these Employees were not crossing the picket line voluntarily but because of the influence exerted upon them by the officials of Local 1017?

I submit, Mr. Trial Examiner, that the General Counsel has shown a prima facie case on the facts before you, on the allegations of the Complaint, and that the Respondents should be put to coming forward with their defense.

Mr. Davis: Just a couple of brief comments, may I?

Trial Examiner Bennett: All right, briefly.

Mr. Davis: On the last point of Gummow's testimony, I overlooked the matter of Hagopian.

Here again was a case where there was clearly a violation of the contract; as the evidence shows, Mr. Hagopian was borrowed or attempted to be borrowed from another Employer without checking through the Union as the requirement was, so obviously the proper inference is that Mr. Savin was saying. "You are in [260] violation of your contract."

Now, as far as Mr. Andrews was concerned, the testimony was that he was simply standing there. The admission is he was not working. And the further testimony is Mr. Savin didn't say, "You are not supposed to be working." He simply said, "You are not supposed to be here." Now that, on any decision I have ever heard of, is not sufficient to—as a matter of fact, I don't agree with Counsel on the decisions as to what is required to indicate inducement. Employees are free under 8 (c), and the Union representatives, to express their opinion and to give statements of fact, and that cannot be constituted as any unlawful inducement or encouragement.

Finally, I just want to say that even were the best inferences to be given to Counsel for the General Counsel on these little incidents that he has had these people testify about, it still would not avail him, as far as the motion to dismiss is concerned, because if there is no secondary boycott there was no secondary picketing, there was no violation, this was purely a primary dispute engaged in by Local 648 with the possible assistance of other people who were—and that would be in this case Brodke and Savin—there obviously can't be any violation of law because of these incidents. There first has to be found a secondary boycott, a violation of 8 (b) (4) (A), and here there has not.

Trial Examiner Bennett: Your point is the case against [261] Local 1017 stands or falls with the case against 648?

Mr. Davis: That is right.

Trial Examiner Bennett: Is that your position as well?

Mr. Magor: No. My position, particularly with 1017, has more to it than just with 648. That includes also the alleged violation of 8 (b) (1) (A) of the Act as well as the fact that even should the Board or Trial Examiner determine that the activity of Local 648 was protected, I think the case of Local 1017 is a case different and apart from that.

Trial Examiner Bennett: I am disposed to deny the motion with leave to renew it at the close of the hearing, and I do deny it.

Does the Respondent wish to adduce some testimony?

Mr. Davis: Just one moment, Mr. Examiner.

Trial Examiner Bennett: We can take a brief recess if you prefer.

Mr. Davis: Yes, I would like a recess.

Trial Examiner Bennett: All right, five minutes.

(Short recess.)

Trial Examiner Bennett: On the record.

Mr. Davis: Before proceeding, Mr. Examiner, I have an additional motion to strike portions of the Complaint.

Trial Examiner Bennett: Strike portions of the Complaint?

Mr. Davis: Yes.

Trial Examiner Bennett: All right. [262]

Mr. Davis: Paragraph X, Page 4, without waiving or modifying any of the points I have already made on my motion to dismiss, at this time I simply want to move to strike from the Complaint in Para-

graph X, reference to Peninsula Fruit, Nu-Way Produce and Employees of other Employers, appearing at Lines 6 and 7 of Paragraph X, on the ground there has been no evidence offered in any way to establish the allegations of that paragraph with respect to Peninsula Fruit, Nu-Way Produce or Employees of other Employers.

Mr. Magor: I submit, Mr. Trial Examiner, it should be denied. There was testimony by Rose Misuraca with respect to one of those two companies, which one I can't recall at the present moment; true enough that the other one she did not know whether they had employees, but the evidence in the record will speak in that behalf, and her testimony was that their employees did not work. Both of them are also members of the Association, as the Powers-of-Attorney in evidence indicate.

Mr. Davis: Assume that all of that be true—I disagree, but assume that to be true, all Counsel is saying that this witness is supposed to say that the employees of one of these Employers didn't work. That isn't in support of the allegation of the paragraph, besides not being true.

Trial Examiner Bennett: I am prepared to rule. I will deny the motion.

Mr. Davis: And we will offer the same motion, Mr. Examiner, [263] with respect to Paragraph XI as to the same names set forth there, Peninsula Fruit, Nu-Way Produce, and further, to strike the last two lines of the paragraph reading: "to cease

doing business with Long and other Employer members of Grocers Association and the Market."

With respect to the last point, there is no evidence whatsoever in the record that these individuals were in any way doing business. As a matter of fact, the testimony is that they were not.

Mr. Magor: That, too, should be denied, Mr. Trial Examiner.

Trial Examiner Bennett: What do you rely on for doing business?

Mr. Magor: The fact that a lessee-lessor relationship between Long, and the Board has pointed out in a somewhat recent decision, the citation which I may have with me, that the lack of a demand upon the secondary Employer to cease doing business with the primary Employer is immaterial under Section 8 (b) (4) (A). That is United Marine Division, Local 333, New York Shipping Association, 107 NLRB No. 152; 33 LRRM, 1221, January 6, 1954.

Mr. Davis: Is Counsel saying that specific language of the Statute is immaterial? That is what the Statute says, says, "doing business."

I am familiar with the case he cites. It doesn't, in my view, hold any such thing, nor could it hold any such thing [264] because the Statute language is there and must be observed.

Trial Examiner Bennett: I will deny the motion.

Mr. Davis: Mr. Jinkerson, will you take stand, please.

CLAUDE JINKERSON

a witness called by and on behalf of the Respondents, having been previously duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Davis): I think you have already given for the record your address and occupation, Mr. Jinkerson.

You were directly involved in the dispute that existed between your organization, Retail Grocery Clerks Union, Local 648, and the J. M. Long Company and others in the month of February, 1955?

A. Yes, I was.

Q. Please describe the circumstances leading up to the placing of pickets which has been testified about here at the premises of the J. M. Long Company in the Crystal Palace Market?

A. For what date do you want me to start from, the beginning of the lock-out?

Q. Whatever circumstances that led up to that, the decision to place the pickets and actual placing of the pickets and the date, depends on what those circumstances are in your view.

A. The start of the lock-out on February 4, Pat Savin of [265] Local 1017 came to my office and informed me that he had a conversation with Mr. Haag of the J. M. Long Company. Mr. Haag wanted him to convey to me that he had adopted a policy in the J. M. Long Company Market, Crystal Palace, whereby firms were either to lock down and cease to operate, that he would not permit the firms

(Testimony of Claude Jinkerson.)

to lay off their employees and continue to operate by themselves.

I had occasion the following day, when employees of Ostrow's and the Italian Importing Company reported to the office, saying that they had been laid off.

I asked Mr. Savin to refresh his mind about the conversation and go down to the Crystal Palace Market to Mr. Haag and inform him that these people had been laid off contrary to his statement; the employees would return to work at Ostrow's and also Italian Importing Company.

Mr. Magor: If this is going to be a lengthy testimony from this witness, a lengthy answer, I am going to move to strike it as hearsay, the conversation reported between Savin and Mr. Haag of the Crystal Palace Market.

Trial Examiner Bennett: I will permit that to stand. However, I am receiving it only as evidence of what was brought to the witness' attention, and not as evidence of the original conversation.

Mr. Davis: That is proper, Mr. Examiner. I assume that that same ruling applies to the testimony of General Counsel [266] introduced to which I didn't make specific objection but the record is full of exactly the same kind of testimony.

Trial Examiner Bennett: Well, if it be hearsay, it is hearsay as far as I am concerned.

Mr. Davis: Proceed.

Trial Examiner Bennett: But before you continue, what day did you place the pickets there?

(Testimony of Claude Jinkerson.)

The Witness: Crystal Palace Market?

Trial Examiner Bennett: Yes.

The Witness: 15th of February.

On the first Monday after the lock-out, I believe on February 7, Eric Lyons, the Business Representative of Local 648 in the Downtown Area, was asked to go back to the Crystal Palace Market and return employees from Ostrow's and the Italian Importing Company again who had been laid off as of Saturday night.

Q. (By Mr. Davis): Was asked by you to do this?

A. That is right. They had reported to me that they were back in again, having been laid off as of Saturday night.

The employees were returned to the Italian Importing Company stand—Ostrow had closed down his business and was not trying to operate his department.

On approximately February the 12th, Mr. Eric Lyons again came to me and requested that he be permitted to go in the Crystal Palace Market and sign up operators in the Crystal Palace [267] because they had requested him to come in and tender a contract.

We reviewed the situation where they had been opening up and closing up and decided that he should go in and meet with the Employers in the Crystal Palace Market and offer them the contract that had been established in the industry.

He reported to me later that he had done so and

(Testimony of Claude Jinkerson.)

that his approach had been to call them together in a meeting to ask them to sign as a group. However, he had secured two signed contracts before calling the meeting, which he had not mentioned to the other operators.

Later on that same day, he informed me that he had been contacted by one of the operators in the Crystal Palace Market who wanted to sign a contract and had been instructed not to do so.

After discussing the matter on the following day, which was a Saturday, I called Mr. Haag and asked for an appointment Monday to discuss the situation with him.

Monday, on February the 14th, I believe, I asked representatives of the Butchers' Union, George Masseur, Barney Mayes, Anthony Anselma of the Culinary Joint Council, Herman Eimers, Eric Lyons, myself, representing the Grocery Clerks' Union, met with Mr. Haag at the Crystal Palace Market. Shortly after the meeting started, a Mr. Green, who I met for the first time, and told to me as being Merchandising Manager, appeared at the [268] conference.

Trial Examiner Bennett: Any representative of Local 1017?

The Witness: Allen Brodke was from 1017.

Informed Mr. Haag that on February 11 we had notified the Grocery Industry of San Francisco there was some twenty-nine Employers in San Francisco who remained unsigned; that an industry contract had been established in the Grocery Indus-

(Testimony of Claude Jinkerson.)

try, adopted by a majority of the Employers in San Francisco, and covering the majority of Employees who worked as grocery clerks.

We asked Mr. Haag to use his good offices to bring the thing to conclusion, pointing out to him we thought that the lock-out was futile, that it had failed, and we wanted to bring the thing to an end.

We pointed out to him that he had been used in this similar capacity in other situations. We thought that his leadership was necessary at this time.

We pointed out to him that in the Crystal Palace Market operation where he controlled the market, J. M. Long and Company had locked out their employees; in addition to that, they were permitting representatives of J. M. Long Company to induce other people not to sign the contract and it caused a situation where our people were working one day and laid off the next day; that it could not continue on that basis.

We asked him that if he would sign a contract for J. M. [269] Long Company with the Grocery Clerks Union. He said that he had given his word to the Retail Grocers Association, however he didn't make that decision, that would be up to Mr. Green.

I turned to Mr. Green and asked him the same question that I had asked him, whether or not he would sign on behalf of J. M. Long and Company an agreement.

And, to the best of my recollection, Green didn't answer "Yes" or "No," but said that he thought

(Testimony of Claude Jinkerson.)

that that matter should be taken up with the Grocers' Association first.

We discussed the situation as existed in the Crystal Palace Market and pointed out to him that we believed that now that all of the industry was signed except the Market Street operation in Mr. Lyon's territory we had a perfect right to come to him and ask him to make up his mind; that if he was tied down in the Grocers' Association, we were surely willing for him to go to the Grocers' Association and bring about a meeting or whether he could be released by the Grocers' Association to sign as an individual.

Mr. Haag pointed out to me I had served on other committees who had called upon him at the Crystal Palace Market, and he said, "You know I have made offers before where people were involved that they come inside the market and picket."

I said, "Yes, I have served on this kind of committee. In this case, where J. M. Long have locked out the Grocery Clerks, I think that would be ridiculous." [270]

He said, "I agree with you."

Q. (By Mr. Davis): Mr. Haag said. "I agree with you?"

A. He said, "I agree with you." He said, "I don't think it would give you the economic strength that you might desire."

I said, "Not looking to that at all, Mr. Haag. The thing we look to is that you control the situation in the Crystal Palace Market. In times past we have

(Testimony of Claude Jinkerson.)

come to you and you have straightened out matters in the Crystal Palace Market between other firms that we do business with and we are also in the market."

We pointed out to him that in our opinion his representative had said to the people, because it is what had been told to us, as long as you are in my house you do as I say. And because of that they had refused to sign contracts, or hadn't signed contracts, and had closed down.

He denied that he had made that statement. He denied that any representative of Long and Company had made that statement.

We, however, stood our ground and said that that was what had been passed on to us.

He wanted to know what we intended to do.

We informed him that if he did not sign the contract and return our people to work we intended to advertise to the public of San Francisco that J. M. Long Company was unfair. We also at the same time asked him if he would use his good [271] offices to try to bring about a settlement between the Grocery Clerks' Union and the Standard Groceteria, inasmuch as they had locked out their employees, too, and we intended to advertise to the public that Standard Groceteria was unfair.

Trial Examiner Bennett: Had there been prior picketing of any members of the Retail Grocers' Association?

The Witness: The Union picketed Rossi's market on Vallejo.

(Testimony of Claude Jinkerson.)

Trial Examiner Bennett: What was the date of that, approximately?

The Witness: February 3.

Trial Examiner Bennett: That was the first instance?

The Witness: February 3 or 4. That was the first instance. And City Supermarket on Geary Street. We picketed those two firms originally.

Trial Examiner Bennett: Was that on the same day?

The Witness: Both on the same day. And possibly on the 5th and 6th it was extended to some, maybe thirteen or fourteen other firms where Grocery Clerk members had been laid off and operators had continued to operate their groceries.

Trial Examiner Bennett: I think another question would be in order.

Mr. Davis: Yes.

Q. (By Mr. Davis): Was that the end of the conversation with Mr. Haag, or was anything else said between you at that time? [272]

A. I believe that was the end of the conversation, except that assurance by Mr. Haag that he would contact the Retail Grocers Association.

Q. Did you hear from Mr. Haag again before the following morning?

A. Yes. I heard that same afternoon. Mr. Haag called me and said that he called, talked to Mr. Tissier, that he was standing with the Association.

Q. Did you say anything to him then?

A. No, I didn't say anything at all.

(Testimony of Claude Jinkerson.)

Q. Then what occurred with respect to this dispute?

A. I think one other thing, and that was this, that Haag called me back, possibly within an hour or so, and said that there was a meat firm in the Crystal Palace Market that brought in a lot of meat and he wanted to know if any picketing action could be delayed.

I told him something we would consider but I had a hard time making my mind right at the present time whether they were stalling or what they were doing.

Trial Examiner Bennett: What did you tell him?

The Witness: On his request that we delay?

Trial Examiner Bennett: Yes.

The Witness: I said it could be a stall, we would consider the matter here.

Trial Examiner Bennett: You said you would consider it? [273]

The Witness: The matter at our office, yes.

On the 15th, pickets were placed at the Crystal Palace Market.

Q. (By Mr. Davis): What time?

A. I would say approximately 6:30 the pickets were asked to report in the morning.

Q. Were the pickets given signs?

A. Yes; the one sign that was carried on the line, early part of the thing, prior to eight o'clock, the opening of the market, was a home-made sign made by myself, where we had taken several sheets of mimeograph paper and pasted them over, a

(Testimony of Claude Jinkerson.)

statement about "Don't patronize the Grocery Department," or something like that, and we had inserted the name "J. M. Long and Company."

Trial Examiner Bennett: How did the sign read after you got through with your pasting?

The Witness: "Unfair, J. M. Long and Company," I believe, "Please do not patronize."

Trial Examiner Bennett: What hours were you on the scene that day?

The Witness: 6:30.

Trial Examiner Bennett: Until what?

The Witness: 6:30 until approximately about a quarter after eight.

Trial Examiner Bennett: In the morning? [274]

The Witness: Right.

Trial Examiner Bennett: And then left?

The Witness: That is right.

Q. (By Mr. Davis): Mr. Jinkerson, I show you Respondents' Exhibit 1 and indicate to you thereon the sign reading, "Unfair J. M. Long & Co. Sponsored by S. F. Labor Council—Clerks Union," is all I can read above the head covering some other printing. Is that the sign you referred to as the one that you made?

A. That is correct.

Q. And you pasted the "J. M. Long & Co." over another sign; is that it?

A. Well, there was several blank pieces of paper pasted on and "J. M. Long Company" was pasted on top of that so nothing would show through.

(Testimony of Claude Jinkerson.)

Trial Examiner Bennett: Did you personally prepare the sign?

The Witness: Yes, I did.

Trial Examiner Bennett: When did you prepare it?

The Witness: Night of the 14th, possibly seven, eight o'clock in the evening.

Trial Examiner Bennett: How many signs were there? On the picket line?

The Witness: From about 8:00 o'clock on, possibly as many as a dozen. [275]

Trial Examiner Bennett: How about before eight?

The Witness: Just the one sign.

Trial Examiner Bennett: The one you have told us?

The Witness: That is right.

Trial Examiner Bennett: Are you now referring to all sides of the market?

The Witness: Yes, all sides of the market.

Q. (By Mr. Davis): You had, in addition to your home-made sign, you had signs printed, did you not, designating J. M. Long Company and Standard Grocery?

A. That is correct. They were delivered the morning the pickets were established at Crystal Palace Market.

Q. Mr. Jinkerson, did you have occasion to have photographs taken of the picketing at the Crystal Palace Market? A. Yes.

(Testimony of Claude Jinkerson.)

Q. And approximately when were those photographs taken?

A. They were taken the morning of the first day of the picketing.

Trial Examiner Bennett: At what time?

The Witness: I couldn't tell you the time. I turned it over to somebody else to have pictures taken.

Trial Examiner Bennett: Were they taken before or after you left?

The Witness: They were taken after I left.

Q. (By Mr. Davis): You observed the picket line that morning? [276] A. Yes, I did.

Q. I hand you a series of photographs purporting to be photographs of picketing in front of the front entrance of the Crystal Palace Market and ask you if these are the photographs that you ordered taken and whether they constitute a fair representation of the picketing scene that morning and thereafter?

A. These are all pictures that——

Q. Do they constitute a fair representation of the picketing scene? A. They do.

Q. Both on the first morning and later days of the picketing? A. That is correct.

Trial Examiner Bennett: Do I understand they were taken on more than one day?

The Witness: No, just the one day.

Trial Examiner Bennett: The batch that you just looked at was taken some time after eight o'clock on the first day?

(Testimony of Claude Jinkerson.)

The Witness: That is right.

Mr. Davis: Mr. Examiner, there are seven such photographs.

Trial Examiner Bennett: Why not mark them Respondents' 2 through 8?

Mr. Davis: I have so marked these photographs for identification, Mr. Examiner, and hand them to Counsel. [277]

(Thereupon the above-mentioned photographs were marked Respondents' Exhibits Nos. 2 through 8 for identification.)

Trial Examiner Bennett: Are you offering them at this time?

Mr. Davis: Yes.

Trial Examiner Bennett: As purporting to reflect picketing subsequent to 8:00 a.m. of the first day?

Mr. Davis: And during the course of picketing at Crystal Palace Market. I asked the witness if this was a fair representation of the picketing scene not only on that morning but subsequent to that morning during the course of the period and he said it was.

Trial Examiner Bennett: Objection?

Mr. Magor: I would like a couple of questions on voir dire.

Trial Examiner Bennett: All right.

Voir Dire Examination

Q. (By Mr. Magor): Do you know what time the pictures were taken?

A. No, I couldn't tell you the exact time.

(Testimony of Claude Jinkerson.)

Q. You don't know whether they were taken in the morning or afternoon, do you?

A. Taken in the morning.

Q. How do you know that?

A. How do I know that? [278]

Q. Yes.

A. The report from Larry Vail, who I had asked to see that the pictures would be taken.

Q. Did Vail take the pictures? A. No.

Q. You base your knowledge on a report from Mr. Vail who did not take the pictures; is that it?

A. Sorry.

Q. You base your knowledge on the report from Mr. Vail who also did not take the pictures; is that correct?

A. Mr. Vail was there at the time they were taken.

Mr. Magor: I will waive the foundation, but I object on materiality.

Direct Examination—(Resumed)

Q. (By Mr. Davis): Mr. Jinkerson——

Trial Examiner Bennett: You said you waive foundation?

Mr. Magor: Yes.

Q. (By Mr. Davis): Mr. Jinkerson, were those pictures taken at the same time as Respondents' 1?

A. All taken at the same time.

Mr. Davis: Testimony of Mrs. Misuraca indicates the time that that picture was taken, the first morning of the picketing.

(Testimony of Claude Jinkerson.)

Trial Examiner Bennett: General Counsel has waived any attack on the foundation as to the pictures.

What is your objection now? [279]

Mr. Magor: Materiality.

Trial Examiner Bennett: I will overrule the objection as to their materiality. I don't know that I am prepared to receive them as indicative of the picture of the picketing at any specific time. I think the witness is competent to testify that they represent what he saw on the picket line over a period of time. I don't think he is competent to testify that these represent a status of picketing at a time he wasn't present, namely, after 8:00 a.m. on the first day. I am prepared to receive them on the broader basis, though.

Q. (By Mr. Davis): Well, Mr. Jinkerson, how often did you visit the picket line during the course of the dispute?

A. For the first week, almost daily.

Q. And these pictures represent, they are a fair representation of the scene you saw when you visited the picket line? A. They do.

Trial Examiner Bennett: But you weren't present after 8:00 a.m. the first day?

The Witness: I came back around noon.

Trial Examiner Bennett: Well, let us hear about that. How long were you present?

The Witness: Well, I left the market at 8:15. I went up to the office and came back again, I would say between 11:30 and 12:00, and stayed possibly a

(Testimony of Claude Jinkerson.)

half hour all around the market, completely around the market. [280]

Trial Examiner Bennett: Was that typical of your other visits during the duration of the picketing?

The Witness: Yes. Generally speaking, during early morning hours, I would stop by the market, and also at noon or in the afternoon stop by the market.

Trial Examiner Bennett: For a brief stay?

The Witness: That is right.

Trial Examiner Bennett: I will receive the pictures.

(The photographs heretofore marked Respondents' Exhibits Nos. 2 through 8 for identification were received in evidence.)

Mr. Davis: Mr. Examiner, I have another witness who is off of work to testify and I haven't had an opportunity to interview him. I wonder if we might have a recess at this time for the lunch hour and then I could withdraw Mr. Jinkerson briefly from the stand and put on the other witness.

Mr. Magor: No objection.

Trial Examiner Bennett: All right. We will recess until 1:45.

(Witness temporarily excused.)

(Whereupon, a recess was taken until 1:45 o'clock p.m.) [281]

After Recess

(Whereupon the hearing was resumed, pur-

suant to the taking of the recess, at 1:45 o'clock, p.m.)

Trial Examiner Bennett: On the record.

As I understand it, Respondent wants to call a witness out of order.

Mr. Davis: That is correct, Mr. Examiner.

Mr. Jack Hagopian, would you take the chair up here, please.

JACK HAGOPIAN

a witness called by and on behalf of the Respondents, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Davis): Your full name, please?

A. Hagopian—Jack Hagopian.

Q. What is your address, Mr. Hagopian?

A. 2786 Folsom Street.

Q. What is your occupation, Mr. Hagopian?

A. My real occupation is a shoemaker.

Q. What are you doing at the present time?

A. Well, I am doing, producing work.

Q. Produce clerk? A. Yes.

Q. Who are you employed by? A. Now?

Q. Yes, now.

A. With Billy—What is his name? Peninsula Fruit Company.

Q. That is at the Crystal Palace?

A. That is right.

Q. Were you employed at the Crystal Palace Market in January and February of this year?

A. Yes.

(Testimony of Jack Hagopian.)

Q. Do you recall a picket line that was established at the Crystal Palace in February?

A. The first time I went there, well, I went in the back door, see,——

Q. I am asking you if you recall that there was a picket line there.

A. No, no, I never went through a picket line.

Q. I am not asking that. Do you remember seeing a picket line in February, 1955?

A. That is right.

Q. All right. At the time you saw that picket line who were you employed by? A. Rose.

Q. Rose Misuraca? A. That is right.

Q. How long had you been employed by her?

A. Well, about four or five months.

Q. About four or five months. Were you a [283] member of the Retail Clerks Union or Local 1017 or any other Union?

A. No. I am just on the permit.

Q. At that time were you a member?

A. That is right.

Q. Were you on a permit?

A. That is right.

Trial Examiner Bennett: When you were working for Rose Misuraca, you were under a permit?

The Witness: Permit, that is right.

Q. (By Mr. Davis): Now, there has been testimony here that this picket line took place on a Tuesday morning.

A. Tuesday morning, that is right.

(Testimony of Jack Hagopian.)

Q. Do you recall the Monday before that Tuesday?

A. Yes. I went in Monday morning to see what she was going to do. When I went in there, everything is gone out of the stand, not a thing on the stand. Everything she got on the stand was empty, bare.

Q. Was she there?

A. No, she wasn't there that morning.

Q. She wasn't there. You said you saw a sign. What did the sign——

A. That was Tuesday.

Q. But Monday morning we are talking about now.

Trial Examiner Bennett: Just tell us about Monday now.

The Witness: Oh, Monday. Well, when I [284] went there she wasn't there.

Trial Examiner Bennett: She wasn't there?

The Witness: No, she wasn't there.

Trial Examiner Bennett: What time was that?

The Witness: This was seven o'clock.

Trial Examiner Bennett: Is she usually there at seven o'clock?

The Witness: Generally we busy, oh, yes.

Q. (By Mr. Davis): What did you see when you went in there Monday at seven o'clock in the morning?

A. Seven o'clock she was not there, but after a little while, about eight or nine o'clock it was, she was making some sign.

(Testimony of Jack Hagopian.)

Q. You saw her making a sign?

A. Yes. She was making on white paper with sign.

Q. What did the sign say?

A. Sign says Union ain't going to take care of my kids and all those stuff.

Trial Examiner Bennett: This is on Monday?

The Witness: Yes, that is right.

Q. (By Mr. Davis): Now, did you have any conversation with her on Monday? Did you talk to her?

A. Well, I talk this much, I say, "What you going to do, Rose?"

She says, "Well, wait till the strike is over because—she don't have any money to start it anyway. [285]

Trial Examiner Bennett: Didn't have any money to start what?

The Witness: Can't start business because she owe everybody the money, you know. She can't operate.

Trial Examiner Bennett: Next question.

Q. (By Mr. Davis): Now, what did you do that day, on Monday? You say the stand was closed. Did you work anywhere?

A. Well, I worked Gummow's hour and a half.

Q. You went to work for Gummow on Monday?

A. Yes.

Q. This is before the picket line?

A. Yes, picket——

Q. How long did you work for him?

(Testimony of Jack Hagopian.)

A. I work hour and a half.

Q. Did you have any conversation with Mr. Gummow?

A. Well, I borrowed one-fifty out from him so I had to pay it back. He asked me to work. I says, "I don't want to get in jam."

He says, "That is all right," he says, "I take care."

Trial Examiner Bennett: Would you read that last answer back.

(Answer read.)

Trial Examiner Bennett: Next question.

Q. (By Mr. Davis): Well, how did you happen to only work an hour and a half for Mr. Gummow? [286]

A. Well, hour and a half I work, I see Pat is passing through there.

Trial Examiner Bennett: Who?

The Witness: Pat, Mr. Pat (pointing).

Q. (By Mr. Davis): Mr. Hagopian, we are still talking about Monday before the picket line went on. This was Monday?

A. Yes, that was Monday. Warren asked me if I can't work hour and a half help him out.

Trial Examiner Bennett: You said you saw Pat come in?

The Witness: Well, I start to work, then I see Pat come around. He says, "What you doing, Jack?" And I want to speak, he don't stop, I want to talk to him. He just walk away.

(Testimony of Jack Hagopian.)

Trial Examiner Bennett: I think the witness pointed to Pat Savin.

Q. (By Mr. Davis): Is this Pat Savin you are talking about? A. Yes.

Q. You said he said "What are you doing Jack?" and kept on going?

A. Kept on going. When I was going to talk with him he don't stop.

Q. On Tuesday—Did you go to work on Tuesday morning?

A. No. I don't go Tuesday morning because—he asked me to go to work Tuesday morning, to come; he says, "Don't worry about anything," but I don't go. [287]

Trial Examiner Bennett: Who asked you to go to work?

The Witness: Warren.

Q. (By Mr. Davis): Warren Gummow?

A. Gummow, yes.

Q. Now, did you work at any place in the Crystal Palace Market while the pickets were there? A. No. No place.

Q. During that time did you have any conversation with Mr. Savin or Mr. Brodke about working in the Crystal Palace Market when the pickets were there? A. No.

Q. Did you talk to him about that?

A. No.

Q. Only conversation you had with the Union agent during that period was when——

A. That's right.

(Testimony of Jack Hagopian.)

Q. ——Pat Savin came by and said, "What are you doing"?

A. Just say that. But another fellow there, he called me. He said, "What you doing?" He says, "You know," he says, "you be all out with the Union." Say, "What you doing there?"

I say, well, "I not strikebreaking."

Q. When was this? A. That day.

Trial Examiner Bennett: Where were you?

The Witness: I was just trying to go find [288] out about Rose, what they going to do. Even I didn't know there was going to be pickets there.

Trial Examiner Bennett: This was the day after?

The Witness: That is right.

Trial Examiner Bennett: You are starting to go in?

The Witness: Well, I don't go in. Picket there. But I went in day before, I went in back door.

Trial Examiner Bennett: But on this day?

The Witness: I don't go in because there was picket there.

Trial Examiner Bennett: You said somebody spoke to you?

The Witness: Nobody spoke to me, but Warren told me day before that I was working for hour and a half, he says, "Come down work tomorrow."

Trial Examiner Bennett: Who spoke to you on tomorrow?

The Witness: The day I work hour and a half, Warren.

(Testimony of Jack Hagopian.)

Trial Examiner Bennett: Now, that is the day the pickets started?

The Witness: That is right. That was Monday. He says, "Come down work tomorrow. Don't worry about it." But I don't go.

Trial Examiner Bennett: How about on Wednesday? Did you talk to somebody on Wednesday?

The Witness: No. I wasn't there Wednesday. I see Rose and I asked, I says, "What we going to do? You going start it?" [289]

She says, well, "Not now, I can't start it," because she don't have no money to start it out.

Q. (By Mr. Davis): Before you went to work for Mr. Gummow, after you found Rose's stand closed up, did you call the Union to find out if you could work for Mr. Gummow? A. No.

Q. Do you know whether Mr. Gummow did? Did he talk to the Union?

A. I don't know. He told me he talk with somebody. That is why I started to work hour and a half.

Q. Mr. Hagopian, what kind of work did you do for Mrs. Misuraca in January and the first part of February?

A. Well, I was doing for him, because after the husband is away I was get up morning six o'clock and she gave me the $30.00, $40.00 $35.00 to go with my own car, buy some stuff, bring it back once, then turn and go back again, two trips.

Q. That is, you buy at——

A. Yes, I was buyer.

(Testimony of Jack Hagopian.)

Q. You bought produce at the produce market; that was your job?

A. That is right. That is right.

Q. What was your rate of pay?

A. My regular pay should be, five day, should be $80.00, $85.00.

Q. Did you get paid that? [290]

Mr. Magor: Objected to on the ground it is immaterial. A. I don't get it yet.

Mr. Magor: I move to strike the answer.

Trial Examiner Bennett: The answer may stand.

Mr. Davis: That is all.

Cross Examination

Q. (By Mr. Magor): Now, Mr. Hagopian, you say Rose was making a sign on Monday?

A. That is right.

Q. There were no pickets on Monday morning?

A. Well, I don't know there was or not because I don't see pickets. I went in back door.

Q. Well, did you see any pickets on Monday?

A. No, I don't see him.

Q. You didn't see any pickets all day Monday?

A. No.

Q. You saw pickets on Tuesday?

A. No, I just went there and I walk out. I see her and say, "What you going to do?" I walk out. I don't stay there long.

Trial Examiner Bennett: Which way did you walk out?

The Witness: I came in back door. I went out of the back door yet.

(Testimony of Jack Hagopian.)

Q. (By Mr. Magor): And when you went out the back door, did you see any pickets there when you went out the back door?

A. I seen one. There was one on the back door, one out. [291]

Q. That was Monday? A. One person.

Q. That was on Monday? A. That is right.

Q. There was a picket there?

A. Well, I don't know. There was somebody there.

Q. Well, did he have—did he have a picket sign?

A. Picket sign—no, he don't have no picket sign, no.

Q. Did he have a band, or chest band around him? A. He had the band. He had one band.

Q. Did it say, "A.F.L. Picket"?

A. Yes. He says, "Where you going, Jack?" he says. "I just going in to see somebody."

Q. That is the day you saw Rose making the sign? A. That is right.

Q. That is also the day you worked for Mr. Gummow, is it? A. That same day, yes.

Q. And there were pickets there at that time, were there?

A. There was one on the back door when I was going in, anyway.

Q. Did you ever walk around the front of the Crystal Palace?

A. No, I don't go there at all because I work there one hour and a half, just hour and a half.

(Testimony of Jack Hagopian.)

Q. What were you doing when working for Mr. Gummow?

A. I was on the register, cash register.

Q. Did you see Pat Savin on that day? [292]

A. Yes, Pat Savin that day.

Q. Will you tell us now what Pat Savin said to you?

A. He just come down, he says, "What you doing, Jack?"

He was walk away. I want to stop, you know, talk with him. He don't stop.

Q. Did you talk with him after that?

A. I don't talk to him after that.

Q. You have—Have you ever talked to Pat Savin since? A. No.

Q. Never discussed or talked to Pat at all?

A. No.

Q. Ever discuss your testimony with Pat Savin?

A. No. He never say anything to me. That is one picket Tuesday, I was going in again, and he is jump on me, he says, "What you doing, Jack?" he says, "You trying to broke the strike?" I say "No, I'm not strike broke."

Q. Where were you going on Tuesday?

A. I want to go in see her, see what they going to do.

Trial Examiner Bennett: Pointing to Rose Misuraca.

The Witness: Find out what she was going to do.

Another thing, she was owe me money. I was going try to collect, and still I don't get it.

(Testimony of Jack Hagopian.)

Trial Examiner Bennett: The record may indicate that when the witness previously was testifying about the sash on one picket at the rear door, he pointed to, made a gesture across [293] his chest.

Mr. Magor: No further questions.

Redirect Examination

Q. (By Mr. Davis): Mr. Hagopian, did you ever talk to Mr. Magor, the man who was just asking you questions?

A. Yes. He come down last Saturday.

Mr. Davis: That is all.

Mr. Magor: All right.

Recross Examination

Q. (By Mr. Magor): Did I talk to you a week ago Saturday? A. That is right.

Q. Did I talk to you at the Crystal Palace Market? A. That is right.

Q. Was anybody else present at that time?

A. No, no. You and I.

Q. We were talking outside? A. Yes.

Q. Did you tell me at that time that Pat Savin came through there and told you, "You better watch out, Jack"?

A. Well, no. He says, "What you doing?" Just that is all, just pass away, that is all he did.

Q. Did I tell you that Mr. Gummow had told us that Pat Savin had said in words in effect if you continued working in there you would be blacklisted in San Francisco and you would never work as a fruit man again? [294]

Mr. Davis: I will object to that as assuming a

(Testimony of Jack Hagopian.)

fact not in evidence. There is no such testimony that Mr. Gummow ever said any such thing.

Trial Examiner Bennett: He may answer.

Mr. Davis: There is some testimony about somebody named Higgins to that effect, but not Mr. Hagopian. But go ahead.

Trial Examiner Bennett: Would you read the question back.

(Question read.)

Trial Examiner Bennett: Did Mr. Magor over here say that to you when he spoke to you on Saturday?

The Witness: Well I mean, is not Pat told me anything about that, but the guy, one of the pickets told me, even I don't know him, I never see him before, he told me, he says, "If you go in again,"—because I work hour and a half—he says, "you will never work in this Union."

Trial Examiner Bennett: Do you know the name of the Picket?

The Witness: Well, I don't know. He was a stranger. He wasn't working on the same market anyway.

Trial Examiner Bennett: He was a stranger to you?

The Witness: Yes. I never see him before.

Q. (By Mr. Magor): Did you talk to Mr. Corsini over the phone—Do you know Mr. Corsini?

A. No. I never talk with him. I never talk with the phone.

Mr. Davis: May the record show Counsel [295]

(Testimony of Jack Hagopian.)

for General Counsel pointed to Mr. Corsini when he asked that question.

Mr. Magor: That is right.

Trial Examiner Bennett: This is Mr. Corsini over here, the man I pointed to. You are being asked if you spoke to Mr. Corsini on the phone.

The Witness: I never called to anybody on the phone.

Q. (By Mr. Magor): Did you ever talk to him on the telephone? A. I don't remember.

Q. Were you a permit man before the strike started? A. That is right. Still on the permit.

Q. And why didn't you go back to work for Rose after the strike was over?

A. Because she can't start business. She can't afford to pay my wages. She still owe me $74.00.

Q. Have you had difficulty in getting work since the strike is over?

A. Sure. I try. I go back there, but she don't want me because she can't afford to pay.

Q. Did you have any difficulty getting work from Pat Savin after the strike?

A. No. Still owe me $74.00. Still I can't get him.

Trial Examiner Bennett: He is asking you about getting work from somebody else.

The Witness: Yes, somebody else, yes, I am working now.

Q. (By Mr. Magor): Did you have any difficulty getting that [296] job?

A. Sure, I getting at least my wages.

(Testimony of Jack Hagopian.)

Trial Examiner Bennett: No. He asked you if you had any trouble getting that job.

The Witness: Trouble, no.

Q. (By Mr. Magor): Pat Savin put you right to work, right after the strike was over?

A. That is right, that is right.

Mr. Magor: No further questions.

Mr. Davis: No questions. Thank you, Mr. Hagopian.

Trial Examiner Bennett: You are excused. That is all.

(Witness excused.)

Mr. Davis: Mr. Jinkerson, will you resume the stand.

Trial Examiner Bennett: By the way, does the record supply the exact title of Mr. Savin?

Mr. Davis: I don't know if it does. He will be on the stand in a few minutes.

Mr. Magor: I think he has been identified.

Trial Examiner Bennett: We will resume with Mr. Jinkerson.

CLAUDE JINKERSON

a witness called by and on behalf of the Respondents, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Davis): Mr. Jinkerson, were all of the grocery [297] operators in the Crystal Palace Market members of the Retail Grocers Association prior to the picketing incident?

(Testimony of Claude Jinkerson.)

Trial Examiner Bennett: If you know.

A. Grocery operators, yes. Only two grocery stands.

Q. There were other operators that your Union had contracts with, were there not, in the market?

A. Yes, delicatessens and creameries.

Trial Examiner Bennett: You had groceries, delicatessens, and creameries at the Crystal Palace?

The Witness: That is right.

Q. (By Mr. Davis): Now, of these delicatessens and creameries, can you tell us which, if any, of those were members of the Retail Grocers Association and which were not, if any, at this same time?

Mr. Magor: I assume this is all to the witness' knowledge.

Mr. Davis: That is the way the question was put, I thought.

A. Only one that I know of that was a member of the Retail Grocers Association was the Italian Importing Company, Joe Damonte.

Q. Now, did your Union have contracts with these other operators of delicatessens and creameries at this time prior to the picketing in the Crystal Palace Market? A. Yes. [298]

Trial Examiner Bennett: Were those individual contracts?

The Witness: Individual contracts.

Q. (By Mr. Davis): Do you have copies of any of those contracts with you?

A. I have them in that folder there. (Envelope handed to witness.) I have the four contracts here,

(Testimony of Claude Jinkerson.)

signed for the 1954 period, effective from January 1st, 1954, to December 31, 1954.

Q. And who are parties to these contracts?

A. Holzer's Creamery, Department 105, operated by Fred Holzer.

Q. Signed by whom?

A. Signed by Fred Holzer.

Mr. Davis: Like to mark that contract for identification as Respondents' Exhibit 9.

(Thereupon the above-mentioned document was marked Respondent's Exhibit No. 9 for identification.)

The Witness: Italian Importing Company, signed by Joe Damonte, Department 109.

Mr. Davis: That will be marked as Respondents' Exhibit 10 for identification.

(Thereupon the above-mentioned document was marked Respondents' Exhibit No. 10 for identification.)

The Witness: Kessler's Delicatessen, signed by Samuel Rodetti, Department 170.

Mr. Davis: That will be marked as Respondents' Exhibit 11 for identification. [299]

(Thereupon the above-mentioned document was marked Respondents' Exhibit No. 11 for identification.)

The Witness: Ostrow's Delicatessen, signed by Max Ostrow, Department 59.

Mr. Davis: That will be marked as Respondents' Exhibit 12 for identification.

(Thereupon the above-mentioned document

(Testimony of Claude Jinkerson.)

was marked Respondents' Exhibit No. 12 for identification.)

Q. (By Mr. Davis): Are those all?

A. Yes.

Mr. Davis: I hand those exhibits to Counsel for General Counsel for examination.

I will offer these exhibits so identified into the record formally as exhibits.

Mr. Magor: No objection.

Trial Examiner Bennett: Do you contend these were in effect at the time material here?

Q. (By Mr. Davis): Were they in effect, Mr. Jinkerson?

A. They are—were in effect.

Trial Examiner Bennett: Before I rule on the contracts, I note that they state a termination date of January 1, 1955, on the last page.

Mr. Davis: I was going to develop in further testimony. Is there any objection to the foundation or materiality of the exhibits? [300]

Trial Examiner Bennett: Apparently there is none; however, I would like to have the point clarified.

Mr. Davis: I was going to do that.

Trial Examiner Bennett: All right. The exhibits are received.

(The documents heretofore marked Respondents' Exhibits Nos. 9 through 12 for identification were received in evidence.)

Q. (By Mr. Davis): Mr. Jinkerson, had you served notice on these individual employers with

(Testimony of Claude Jinkerson.)

whom you had the contracts in evidence a desire to amend the contracts? A. Yes, we did.

Q. When did you do that?

A. Approximately October 29.

Trial Examiner Bennett: 1954?

The Witness: 1954.

Q. (By Mr. Davis): Now, after January 1st of 1955, were you attempting to secure new contracts from those same employers incorporating amendments to the contracts which are in evidence?

A. Not during the month of January. We were negotiating or attempting to arrive at a contract with the Retail Grocers Association.

Q. At any time after January did you make such attempts with these employers who were parties to these contracts?

A. Yes. Either the 11th or 12th of February we submitted the [301] Industry Contract to them for signing.

Trial Examiner Bennett: What happened?

The Witness: That was the occasion where Mr. Lyons asked them to get together as a group and discuss the matter and let them know as a group. I think the date was the 11th of—or 12th of February.

Trial Examiner Bennett: Is this the meeting with Mr. Haag?

The Witness: That meeting was held in one of the offices of the Crystal Palace Market.

Trial Examiner Bennett: With Mr. Haag?

(Testimony of Claude Jinkerson.)

The Witness: Mr. Haag was brought in afterwards by the operators.

Q. (By Mr. Davis): Were you here the other day when Mr. Green testified he participated in a meeting with Mr. Lyons and these operators?

A. Yes.

Q. That is the meeting you referred to?

A. That is right.

Trial Examiner Bennett: If I follow your testimony correctly, this was a meeting directed only to these four employers.

The Witness: Those four and possibly two others, two other operators were also at the meeting.

Trial Examiner Bennett: Not members of the Grocers Association?

The Witness: That is correct, not members of the Grocers [302] Association.

Q. (By Mr. Davis): Mr. Haag testified the other day, Mr. Jinkerson, that he had this meeting later in the day on the 12th with Fred Holzer, Damonte, Spataro, Rodetti, along with Mr. Green. Those would be the individuals that you made a demand on for contracts?

A. That is correct.

Trial Examiner Bennett: Well, did these four people, namely the four in these contracts, communicate with you again after that?

The Witness: They communicated with Mr. Lyons.

Q. (By Mr. Davis): Did you receive signed

(Testimony of Claude Jinkerson.)

contracts from these employers? Prior to the ending of your dispute, about February 23?

A. There was two that signed.

Q. Which ones?

A. I think Rodetti's and Arcy's.

Trial Examiner Bennett: Arcy's is another one?

The Witness: Is another one.

Q. (By Mr. Davis): Now, Mr. Jinkerson, are you familiar with the interior of the Crystal Palace Market? A. I am.

Q. How are you familiar with it?

A. By visiting the market.

Q. And how many times would you say you have visited the [303] market?

A. Oh, four or five times a year.

Q. And those visits have continued up until the present time?

A. Been visiting each year since I have been in office, for about four or five times each year, or more.

Q. And you have also done that this year from January on, with the exception of the time that the pickets were on the Crystal Palace Market?

A. Yes. I'd say I have been in the Crystal Palace at least twice before pickets were ever placed there.

Q. Mr. Jinkerson, in the course of preparation for these proceedings, did I request of you that pictures be taken of the interior of the Crystal Palace?

A. You did.

Q. Was that request carried out?

(Testimony of Claude Jinkerson.)

A. It was.

Q. I show you two pictures which purport to show the interior of the market and ask if these pictures were the ones that you referred to pertaining to my request?

A. Yes, these were pictures that were taken at the Union's request of the Crystal Palace.

Q. Do those pictures constitute a fair representation of the interior of the Crystal Palace Market as you know it?

A. Yes, they do, though business seems to be off a little bit.

Q. You mean by that that there is not as much ccustomer traffic? [304]

A. Generally they have much more activity on busy days or busy periods.

Trial Examiner Bennett: These are both taken from the same angle, apparently, except one is a little deeper.

The Witness: Yes. One is closer, one is farther back.

Trial Examiner Bennett: Are these taken from the Market Street side or from the other side?

The Witness: Looking toward Market Street.

Trial Examiner Bennett: Looking toward Market Street from the interior of the store?

The Witness: Yes.

Mr. Davis: I will mark these pictures for identification as, the first one with the prominent sign in the middle, lefthand side, reading, "Herod's Crystal Palace—Department 55," as Respondents' 13;

(Testimony of Claude Jinkerson.)

and the second picture, showing the longer view referred to by the Trial Examiner, as Respondents' 14, and I will hand these pictures to Counsel for General Counsel for examination.

(Thereupon the above-mentioned photographs were marked Respondents' Exhibits Nos. 13 and 14 for identification.)

Mr. Davis: At this time, I should like to offer Respondents' Exhibits 13 and 14 for identification into evidence.

Trial Examiner Bennett: Any obection? [305]

Mr. Magor: I will waive foundation. I am objecting to materiality.

Trial Examiner Bennett: They may be received.

(The documents heretofore marked Respondents' Exhibits Nos. 13 and 14 for identification were received in evidence.)

Trial Examiner Bennett: I would like to ask the witness this: Directing your attention to the Retail Grocers Association and those members of the Retail Grocers Association who had stands in the market, how many of those were you interested in in your negotiations with the Grocers Association?

The Witness: Well, to the best of my recollection, if I understand your question correctly, we thought of four as being members of the Grocers Association: Standard Groceteria, J. M. Long and Company——

Trial Examiner Bennett: That is Grocers Association.

The Witness: Freese, that operates the delica-

(Testimony of Claude Jinkerson.)

tessen, and Joe Damonte, Italian Importing Company.

Trial Examiner Bennett: Those are four you considered as members of the Association?

The Witness: Yes.

Q. (By Mr. Davis): Mr. Jinkerson, it is alleged in the Complaint on file herein that you, your Union, picketed all entrances of the Crystal Palace Market. Is that correct?

A. Best of my knowledge, yes. [306]

Q. Why did you do that?

A. Market is operated in such a way that they are all entrances, people can get in from any way, from the back, sides, front, all over.

Q. And your purpose in placing pickets at each of these entrances?

A. My purpose was to appeal to the public.

Trial Examiner Bennett: Purpose was what?

The Witness: Appeal to the public not to shop with J. M. Long.

Q. (By Mr. Davis): Were any instructions given by the Union to the pickets? A. Yes.

Q. What were those instructions?

A. Instructions were to stop customers if possible by appealing to them not to go in the market and shop.

Q. Were any instructions given to the pickets with respect to other employees of other employers working in the market?

A. We told them not to bother them.

(Testimony of Claude Jinkerson.)

Q. Did other employees work in the market during the course of this picketing?

A. Some were working there.

Q. Was anything done by your organization or anyone representing you to prevent that?

A. None whatever. [307]

Q. And these employees worked all during the course of the picketing? A. That is correct.

Q. These employees were members of other Unions? A. Yes.

Q. What time did your Union place the pickets on the Crystal Palace Market the first day, the commencement of the picketing?

A. Approximately around 6:30.

Q. Why were they placed so early?

A. Well, the size of the market, getting the crews together to see they were adequately staffed. Most of our people were held in the office. We wanted to be sure that we had a good crew out on the Crystal Palace Market so that early shoppers going to work would notice that the market was being declared unfair.

Q. Approximately what time does the traffic become heavy in that area down Market?

A. Streetcars and buses and people walking down the street, I would say from a quarter to seven or quarter after seven, something like that.

Trial Examiner Bennett: Directing your attention to those stands in the market that were not members of the Retail Grocers Association, how

(Testimony of Claude Jinkerson.)

many of those in all did you have a dispute with at that time about a contract?

The Witness: At the time of the picketing?

Trial Examiner Bennett: Yes.

The Witness: Actually they had all been closed up the Saturday prior to——

Trial Examiner Bennett: Or immediately preceding that Saturday?

The Witness: We hadn't been conducting ourselves as a dispute. We had been leaving the Crystal Palace Market alone and the first time we approached the Crystal Palace was on the 12th, and I would say from that day on.

Trial Examiner Bennett: Can you say as of the 12th how many non-Association members were you desirous of signing up. You have already given us some indication of that.

The Witness: I have to more or less count them on my fingers.

Trial Examiner Bennett: Why don't you do——

The Witness: Arcy's, Spataro's, Kessler's, Louie's Creamery, or Fred Holzer, Ostrow's. I think that would cover it. Damonte and Freese were considered members of the Association.

Trial Examiner Bennett: That was how many?

The Witness: About four.

Trial Examiner Bennett: Where did Arcy's come in?

The Witness: Arcy was operating in the Crystal Palace a good long time. He had a stand over in the far side, hires limited help, that is, part-time help.

(Testimony of Claude Jinkerson.)

Trial Examiner Bennett: That is a non-Association—— [309]

The Witness: Non-Association member.

Trial Examiner Bennett: Do you want to change the total?

The Witness: No. Of course, going from memory, the fellow who handles the market for us tells me that there's more than I have specified, but I think he should testify.

Trial Examiner Bennett: We will get that from him, then.

Mr. Davis: I have nothing further of Mr. Jinkerson.

Cross Examination

Q. (By Mr. Magor): Can you tell us when you prepared those picket signs, Mr. Jinkerson, or did you personally prepare all of the picket signs?

A. No. That one home-made sign. The rest was made by Daggett Sign Painters here in the City.

Q. And you made the home-made sign yourself?

A. Just one one, yes. Not entirely. I made the one "J. M. Long" insert that was put in there, "J. M. Long and Company."

Q. Is that sign in any one of these photographs that are in evidence? Would you show it to me, sir?

A. I don't see them in these two, but in the rest of them.

Q. Will you point out the sign?

A. Yes. (Pointing to photograph.) This is the home-made one.

(Testimony of Claude Jinkerson.)

Trial Examiner Bennett: Pointing to the sign in the upper top of Respondents' No. 1, top center.

The Witness: And this one, far side of the market.

Trial Examiner Bennett: If I said upper top before, I [310] meant the top center.

Q. (By Mr. Magor): Respondents' Exhibit 7, is that what you are referring to? A. Yes.

Trial Examiner Bennett: And where is the sign there?

The Witness: On the far end of the market. This one (pointing).

Trial Examiner Bennett: Indicating the sign almost directly in back of the pile of orange crates being carried; of course, not being an expert, they may be crates of some other vegetable or fruit, but it is approximately orange crate size.

The Witness: Respondents' No. 6, the third sign that is being carried in the picket line.

Trial Examiner Bennett: Will you point to it?

The Witness: There (pointing).

Trial Examiner Bennett: The one partly obscured?

The Witness: That is right.

And Respondents' No. 5, the sign in the far distance, very faint, the same sign, the one that I prepared.

Trial Examiner Bennett: Apparently the "U" and about half of the "N" are not there, or obscured, for purposes of identification.

(Testimony of Claude Jinkerson.)

The Witness: Respondents' No. 3, the sign is very prominent. [311]

Trial Examiner Bennett: The sign in the left-hand corner?

The Witness: Lefthand corner.

Respondents' No. 2, the sign is the second one carried in the picket line, walking towards the left corner of the picture.

Trial Examiner Bennett: You said you personally prepared this sign?

The Witness: Yes, the "J. M. Long & Co." part I prepared.

Trial Examiner Bennett: Do you know what is under the "J. M. Long & Co., Inc.," if anything?

The Witness: Yes. I believe right directly underneath it was "Don't patronize this grocery department."

Trial Examiner Bennett: "Don't patronize this grocery department?"

The Witness: Yes.

Trial Examiner Bennett: Those five words?

The Witness: Yes. I think these two little dots you see here are the end of the sign painter's "y" or something, and the "P" from "Department."

Trial Examiner Bennett: The "y" from "grocery" and the "P" from "Department" protrude from the bottom over which you superimposed——

The Witness: Yes.

Q. (By Mr. Magor): Now, on the first morning of the picketing, Mr. Jinkerson, how many signs

(Testimony of Claude Jinkerson.)

were down there? How many signs [312] did the pickets have at 6:30 a.m.?

A. From 6:30 up to about ten minutes to 8:00, they had one. The rest had been delivered before I left. I left approximately a quarter after 8:00, so, somewhere around 8:00 o'clock, the rest were delivered, some twelve.

Q. Where did you prepare this sign that said, "J. M. Long," across it? Where did you prepare that?

A. The Union's Office, 1968 Mission Street.

Q. When did you prepare it?

A. Monday evening, the 14th, between seven and eight o'clock at night.

Q. Did you carry that sign yourself that next morning? A. For a short while.

Q. Then you left, you say, about eight o'clock?

A. Yes, shortly after eight.

Q. And I believe you said you returned then some time around noon; is that correct?

A. Between 11:30 and 12:00 o'clock.

Q. Now, let's get back to this conversation you had with Mr. Haag. Do you recall that conversation at the Crystal Palace? A. Yes.

Q. Now, what was it Mr. Haag said about picketing inside the market?

A. It was, "Mr. Jinkerson, you have served on previous committees that visited me," he said, "you have probably heard me [313] offer that picketing should be done inside the market."

I said, "Yes, I have served on committees and I

(Testimony of Claude Jinkerson.)

heard you make that remark. In this case, it would be ridiculous because J. M. Long & Company has locked out the Grocery Clerks."

Q. What else was said?

A. What else was said after that?

He said, "Well, I agree with you. When you talk about these people walking up and down in front of a locked-out place I agree it would look ridiculous and it probably wouldn't give you the economic strength that you would desire."

Trial Examiner Bennett: I gather that he had made such an offer to you in prior disputes?

The Witness: I had heard that statement made, "Why don't you come inside and picket?"

Trial Examiner Bennett: What had your——

The Witness: ——on a previous occasion.

Trial Examiner Bennett: What had your answer been on other occasions?

The Witness: "No."

Q. (By Mr. Magor): You understood him at this time to be making the same offer to come inside and picket?

A. Well, this is only one thing, he was laying the groundwork to make such an offer. Don't think he made it, but he was laying the groundwork to make it.

Q. You understood he was offering to come inside and picket, [314] didn't you?

A. No. He referred to that, but he didn't make an offer.

Q. You say that when this all started that Mr.

(Testimony of Claude Jinkerson.)

Pat Savin had come and told you that the employees of Ostrow's and some other place had been laid off?

A. No. No, Mr. Savin came to me and said that he had a message from Mr. Haag. Mr. Haag wanted me to know that either the stands would lock down completely or stay open completely. He would not permit any program where the stands would be operated and the people laid off.

Q. Did you send Mr. Savin then back to see Mr. Haag?

A. The following morning when people reported to me from Ostrow's and the Italian Importing Company, I called Mr. Savin and asked him to come out to the office, which he did.

I checked with him again on the conversation and asked him if he would go down with these employees from Damonte's Italian Importing Company and Ostrow's, go out and see Mr. Haag and see that they were returned to the job.

Q. Do you know whether Mr. Savin did that or not?

A. He reported back that he had put them back on the job.

Q. Was Mr. Savin working for your Local during the strike?

A. Mr. Savin assisted us during the strike. He was sent out by his organization to see what he could do.

Trial Examiner Bennett: You say he was assigned by his organization to your organization?

The Witness: To see what he could do, yes.

(Testimony of Claude Jinkerson.)

Q. (By Mr. Magor): Mr. Brodke sent him up?

A. I would assume that, Mr. Brodke or someone else.

Trial Examiner Bennett: Is it fair to say that you accepted the offer of Mr. Savin's services?

The Witness: On a few things, yes. I mean as far as a few assignments were concerned.

Q. (By Mr. Magor): Did Mr. Brodke himself help you during the strike, your organization?

A. Mr. Brodke reported there and asked me if he could be of service. I don't know if we ever used him or not.

Q. Would you look at Respondents' Exhibit No. 7, one of the photographs in evidence?

I withdraw that question.

Would you look at Respondents' Exhibit No. 6. Do you see Mr. Brodke in that picture?

A. I do.

Q. Will you point him out for the Trial Examiner's attention?

A. Mr. Brodke is the gentleman who is standing on the flat truck, looking up the street, in the picture on the lefthand side.

Trial Examiner Bennett: Wearing the hat?

The Witness: Yes. Hat and overcoat.

Q. (By Mr. Magor): Do you represent any employees in the [316] carpenter shop, J. M. Long Company, Crystal Palace Market? A. No.

Q. Any employees employed there to your knowledge?

A. Any employees employed there?

(Testimony of Claude Jinkerson.)

Q. Yes.

A. I believe there are. I have never been in the carpenter shop, so I couldn't say that there are or not. I believe there are.

Q. Does your organization represent any employees in the liquor department of J. M. Long & Company, the Crystal Palace Market? A. No.

Q. Do you know what Union represents those?

A. General Cigar and Liquor Clerks, I believe.

Q. Do you know whether they have a contract with J. M. Long & Company for those employees?

A. I happened to check that. I asked them if they had a signed contract with Mr. Long, and at the time of picketing they didn't have a contract, not a signed contract, but they had reached an agreement as to terms.

Q. Did you represent the employees in the tobacco departments of the Crystal Palace Market?

A. No.

Q. Do you know what labor organization represents those employees? [317]

A. I believe it is also the Retail Cigar and Liquor Clerks Local 1089.

Trial Examiner Bennett: How about the housewares and appliance stand?

The Witness: I believe they are under contract with Retail Department Store Clerks Union Local 1100.

Trial Examiner Bennett: A.F.L.?

The Witness: A.F.L.

Q. (By Mr. Magor): Do you represent the em-

(Testimony of Claude Jinkerson.)

ployees in the shoe repair department in J. M. Long? A. We do not.

Q. Do you know what labor organization represents those employees? A. No, I don't know.

Q. Do you represent the employees in the bakery in the Crystal Palace Market, your organization?

A. Yes, bakeries that are operated in the Crystal Palace are under contract with Local 648.

Q. They are? A. That is correct.

Trial Examiner Bennett: Is that a separate association or what?

The Witness: Yes, separate association, separate contract.

Trial Examiner Bennett: Bakers Association?

The Witness: Association is San Francisco Retail Bakers [318] Association.

Q. (By Mr. Magor): Was the contract opened at the same time that the picketing was going on around Crystal Palace Market?

A. It had an effective date of September.

Q. You had no dispute with the bakeries in the Crystal Palace Market at that time? A. No.

Q. How about the restaurant, did you represent the employees in the restaurant?

A. We do not.

Q. ——of the Crystal Palace Market? Do you know what labor organization represents those employees? A. No, I couldn't testify to that.

Q. Do you represent the floor sweepers in the Crystal Palace Market? A. No.

(Testimony of Claude Jinkerson.)

Q. Do you represent the maids that work in the Crystal Palace Market? A. No.

Q. Do you represent the employees working in the beauty parlor in the Crystal Palace Market?

A. No, we do not.

Q. Now, is it a fact, Mr. Jinkerson, that the butchers were passing the picket line at the time during the strike at Crystal Palace Market? [319]

A. I think the butchers remained working there.

Trial Examiner Bennett: Those are the employees of the several meat stands?

The Witness: Yes.

Q. (By Mr. Magor): Now, if I follow your testimony, you say that you had separate contracts in evidence with Holzer, with Italian Importing, with Kessler's Delicatessen, and with Ostrow's?

A. Yes.

Q. Now, was it your testimony that you submitted the Industry Contract to them on February 11, 1955?

A. February 12. February 12, the contract that we had signed by everybody in San Francisco other than the 129 who were holding out was submitted to them for signing.

Q. What do you refer to when you say the Industry Contract?

A. We had established an Industry Contract during this period of the lock-out from the 4th up to the 12th. Every merchant in town had signed except about 129 operating grocers, and——

Trial Examiner Bennett: Some of those were

(Testimony of Claude Jinkerson.)

members of the Association and some were not?

The Witness: Most of them were members of the Association. A few were not.

Trial Examiner Bennett: We are talking now about the 129.

The Witness: Yes, that is right. [320]

Q. (By Mr. Magor): After the strike was settled, it was an industry-wide contract negotiated, was there not? A. No, there was not.

Q. With the Association?

A. There was not, no.

Q. Is it still under the consideration for being entered into?

A. No. We sat down with Mr. Tissier, Retail Grocers Association, and we did offer him the Industry Contract with some four changes. They were face-savers. There were no negotiations.

Trial Examiner Bennett: As of, say February 12, were the contracts you were attempting to negotiate with the non-Association members similar to the contracts you were attempting to negotiate with the Association members?

The Witness: Yes, it was the same.

Mr. Magor: That is all.

Redirect Examination

Q. (By Mr. Davis): Mr. Jinkerson, how did it happen that you had only one sign on the picket line the morning of the first, the commencement of the picketing at the Crystal Palace, this sign that you pasted over?

A. I had asked W. G. Desepte, member of Local

(Testimony of Claude Jinkerson.)

648, to secure from Daggett signs covering J. M. Long & Company dispute, and the Standard Groceteria, giving the wording to be on the signs. He reported back to me that Dagget had them finished [321] but they were not dry. They would be delivered in the morning.

Q. So you took the one sign that you were able to construct? A. That is right.

Q. Well, that was a sign that had already been printed, and you, as I understand your testimony, pasted over the words "J. M. Long." What had that sign been used for before this, if anything?

A. The sign had been used in front of other grocery departments or in front of markets where they had a grocery department.

Q. Not connected with the Crystal Palace?

A. No.

Q. I believe the Trial Examiner asked you if Mr. Haag had made a previous offer to you to come inside and picket. Is that correct?

A. He didn't make it directly to me.

Q. Who did he make it to?

A. He made it to the Union involved at that time.

Q. Your Union was not involved?

A. No. I was serving as a committee member only in that dispute.

Q. You haven't had any other dispute with the Crystal Palace where picketing has been necessary, have you? A. This is the first one.

Q. As a matter of fact, this is the first dispute

(Testimony of Claude Jinkerson.)

that you [322] have had in San Franisco since your organization, outside of a dispute with Safeway Stores, isn't that correct? A. That is correct.

Q. You have never picketed any of these employers before? A. No.

Q. So the record will be clear, there was reference to Mr. Brodke's picture in one of these pictures which are Respondents' Exhibit 1—6, I'm sorry.

For the record, is Mr. Brodke wearing any kind of insignia?

A. No, he is not that I can see.

Q. There's a lot of people marching there holding signs, wearing insignia. Is Mr. Brodke part of that line?

A. No. Mr. Brodke is removed from the line and between he and the line are three or four customers passing down the street.

Q. Potential customers? A. Passers-by.

Trial Examiner Bennett: I think we can stipulate that Mr. Brodke appears to be well dressed on that occasion.

Mr. Davis: I have no further questions of Mr. Jinkerson.

Mr. Magor: Nothing further.

(Witness excused.)

Trial Examiner Bennett: We will have a short recess.

(Short recess.)

Trial Examiner Bennett: On the record. [323]

Mr. Davis: Mr. Lyons.

ERIC LYONS

a witness called by and on behalf of the Respondents, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Davis): Your full name, please, Mr. Lyons?

A. Eric C. Lyons, 316 Naylor Street, San Francisco.

Q. What is your occupation?

A. Business Representative, Grocery Clerks Union, Local 648.

Q. How long have you held that position?

A. Since August of 1951.

Q. That is an elective office? A. Yes, it is.

Q. As a Business Representative of Local 648, are you assigned a territory in San Francisco?

A. We have three Business Agents and we have three territories in the City of San Francisco and counties adjoining.

Q. Your territory includes the area of the Crystal Palace Market, during the months of January and February, 1955? A. It does.

Q. On or about February 12, 1955, did you have occasion to call upon individuals in the Crystal Palace Market with whom you had collective bargaining relations? A. Saturday morning.

Q. That was about February 12? [324]

A. February 12.

Q. Did you go into the Crystal Palace Market that morning?

A. That I did, to secure signed contracts.

(Testimony of Eric Lyons.)

Q. And who did you talk to?

A. I talked to about eight employers that are signed to a contract with the Association, and also signed individual contracts.

Trial Examiner Bennett: Of the eight, some were Association members and some were not?

The Witness: That is correct.

Q. (By Mr. Davis): Did you talk to them in a group?

A. Later I talked to them in a group, but when I went in there I spoke to them individually in their particular stands that they operated.

Q. Can you name them?

A. Yes. When I went in the market I approached Frances Ketchum, Crystal Palace Catering Service, presented her with a contract which she signed.

I then went to the California Dried Fruits, which always signs a contract with us.

From there I went to Mr. Arcy's delicatessen and he signed a contract.

Trial Examiner Bennett: Did California Dried Fruits sign?

The Witness: Yes.

From there I went to the S & G Delicatessen, [325] Mrs. Spataro, and she had been after me previous visits through the market to get a signed contract, so when I approached her she said that she didn't wish to be the first one. I told her that she wasn't. She asked me to produce signed contracts where someone else had signed prior to her, and I

(Testimony of Eric Lyons.)

told her I wouldn't do that. I didn't think it was necessary. She assured me that I wouldn't have any trouble but to get someone else.

From there I went over to Kessler's Market, which is owned by Roditti, and I was told, "Well, whatever the rest of them do, why, it is all right with me, but I don't want to be first."

From there I went to Italian Importing Company and asked Mr. Damonte about signing a contract. He then suggested that I get all of the operators that were involved and get them in a meeting and present them with a contract all at the same time so that no one could point to one another as being the one to break this so-called deadlock. He pointed out to me that in that market they are all one family; they spend between eight and twelve hours, six days a week, there.

So I thought his suggestion was very good. Mr. Whitfield, who is the, I think, superintendent or maintenance man of the Crystal Palace Market, came by and I asked him if it would be possible that we might meet in Mr. Haag's office or an office upstairs, that I wanted to invite these operators [326] in to present them with a contract and explain the terms of the contract. There was a lot of confusion during this strike and lock-out as to what actually was contained in the contract.

Mr. Whitfield took me upstairs to his office and opened his door and said, "Bring them up here."

With that I went down and invited all of these people——

(Testimony of Eric Lyons.)

Trial Examiner Bennett: Try to keep your voice up.

The Witness: ——invited all of these people who had not signed up to the meeting. They all appeared within about five minutes, including Max Ostrow, who I had not seen and who was supposedly not in the market at that time.

And then Mr. Green came in.

So I explained the terms of the contract, some of the issues that were in dispute, pointed out to those people that it was double time for Sunday, which I thought was the big issue, and not the clerks' work clause.

The question was asked me at that meeting if they signed this contract whether I would guarantee that there would be no pickets placed on the Crystal Palace Market.

I told them that I couldn't answer that question at that time.

So with that I asked them to, pointed out to them that today was Saturday, I knew they were busy, I am sure they would have time to look over the copies of the contract that I left with them tomorrow and would appreciate it if they would [327] have them in our office by six o'clock Sunday evening.

With that I left.

Q. (By Mr. Davis): Did you have any further communication that day with any of the Crystal Palace operators or J. M. Long Company representatives or both?

(Testimony of Eric Lyons.)

A. Yes. I think—I am not sure whether I received a telephone call or someone was up to the office, and said that there had been a meeting that afternoon and that they aren't going to sign the contract.

With that I went down to the Crystal Palace to find out what had happened. I talked to Mr. Damonte of the Italian Importing Company and asked him what had happened.

He said, "Well," he says, "Eric, you know, when you live in my house, you live as I do."

I couldn't receive any more information there. I then tried to locate Mrs. Spataro, was unsuccessful. I then looked for Mr. Holzer, and his wife told me that he was out, would be back about five or ten minutes. I waited. Shortly after, they told me that if I went down to the end of the market to the particular butcher shop, which I don't know the name of, that he was down there. So I went down to the butcher shop and asked for Mr. Holzer, asked one of the butchers. The butcher showed me upstairs and told me they were upstairs.

I then went up and rapped on the door, was invited in. There was the fellow by the name of Emmett who owns that [328] particular butcher shop; I was introduced to him. And Mr. Holzer and another gentleman who was just leaving, I didn't get his name, and he left.

I asked Fred Holzer what had happened.

"Well," he says, "I don't know. I can't make heads or tails out of it."

(Testimony of Eric Lyons.)

Then this fellow Emmett asked me what this was all about. So, there had been confusion in regard to what the contract contained, so we went into discussion on the pros and cons of the contract. I tried to point out to him exactly what was in that.

So, roughly around 6:30 o'clock, 7:00 o'clock, I left the Crystal Palace.

I might add that this fellow Emmett kept his butchers to find out as to what he was supposed to do come Monday morning. I told him I had no knowledge of what would happen over the weekend.

Q. That completes the discussions that you had with the—any of the operators at the Crystal Palace Market prior to the picketing; is that correct?

A. Yes.

Q. You did not receive the signed contract back on Sunday as you had requested?

A. We received no contracts signed on Sunday.

Trial Examiner Bennett: You did get the three [329] signed contracts on Saturday, however?

The Witness: That is right; the first thing Saturday morning.

Q. (By Mr. Davis): On Monday, were your members who were employed by these operators, with whom you had met, on the job?

A. No, they weren't.

Q. Why not?

A. They had been laid off Saturday night, with the exception of the S & G Delicatessen which adjoins Gerbino's Candy and which Mrs. Spataro or Gerbino, as they are known, it is one and the same,

(Testimony of Eric Lyons.)

took the girl out of the delicatessen and put her in candy only, which previously to that she had been working combination. Monday being Valentine's Day, she was working in the valentine department, selling hearts and candies.

Q. Did any of the members report to you what they had been told by their employer when they were laid off on Saturday night?

A. Yes. They said that the pressure was on and that different ones were asked to close down.

Trial Examiner Bennett: If you know, what did Ketchum, California Dried Fruits, and Arcy do with respect to their employees?

The Witness: Mr. Arcy has part-time help, which works Friday and Saturday only. California Dried Fruits has Saturday persons only. [330]

Frances Ketchum has a woman who works part-time five days a week. And on Monday she does not work, and so she wasn't there.

The other two are only Friday and Saturday.

Trial Examiner Bennett: How about Ketchum on Tuesday?

The Witness: Ketchum on Tuesday—I wouldn't know.

Mr. Davis: That is all. You may examine.

Cross Examination

Q. (By Mr. Magor): At this February 12 meeting, when you talked to these eight employers, were you presenting the Industry proposal to them?

A. Presenting the same contract that had been signed in other stores throughout my territory.

(Testimony of Eric Lyons.)

Q. Is that the same contract that was presented to the Grocers Association?

A. With the exception of, I think, two or three changes.

Mr. Magor: No further questions.

Mr. Davis: That is all.

Trial Examiner Bennett: You are excused.

(Witness excused.)

Mr. Davis: Mr. Savin.

HENRY PAT SAVIN

a witness called by and on behalf of the Respondents, being first duly sworn, was examined and testified as follows: [331]

Direct Examination

The Witness: My name is Henry Pat Savin. I reside at 2195 - 34th Avenue. My occupation is Business Representative for the Retail Fruit and Vegetable Clerks Union, Local 1017.

Mr. Davis: Thank you, Mr. Savin.

Q. (By Mr. Davis): How long have you held that position? A. About twenty years.

Q. As part of your duties as Business Agent, do you have business with operators at the Crystal Palace Market? A. We do.

Trial Examiner Bennett: How many?

The Witness: Well, let's see—there is Gummow, and there is Peninsula——

Trial Examiner Bennett: Just add them up in your mind.

The Witness: Around five, I believe. About five.

(Testimony of Henry Pat Savin.)

Q. (By Mr. Davis): You have been in the Hearing Room during the course of these proceedings, have you? A. Yes.

Q. Now, prior to February 15, the day you heard testimony that pickets were placed at Crystal Palace Market by Local 648, did you have any knowledge or indication that such action would be taken?

A. Mind asking the question again?

Q. Before February 15, when you heard pickets went on the Crystal Palace, you heard that that [332] was the date, did you have any indication that, in the days previous to that day, that there would be pickets placed at the market?

A. Yes.

Q. And you received those indications from the Grocery Clerks Union? A. That is right.

Q. Did you do anything about that?

A. Yes.

Q. What did you do?

A. We called up the employers and notified them there was a possibility of pickets being established around the market.

Q. Why did you do that?

A. For one reason, that they wouldn't come up with large loads of produce, and there was a possibility that people would not go through the picket lines.

Q. And that is what you told these employers?

A. That is right.

Trial Examiner Bennett: When did you do this?

(Testimony of Henry Pat Savin.)

The Witness: Just prior to establishing pickets.

Trial Examiner Bennett: With relation to the 15th?

The Witness: Oh, could be on a Friday or a Saturday.

Q. (By Mr. Davis): You talked to Mr. Donabedian? A. Yes.

Q. He is one of the employers you talked to?

A. Yes, that is right. [333]

Q. You told him? A. I did.

Q. Did you talk to Mrs. Misuraca?

A. I was having coffee with her and she happened to be there and we were talking and the conversation led on that there would be a possibility of pickets being established around the market, and the conversation ended right there.

Q. At that time Mrs. Misuraca had one employee; is that right? A. That is right.

Q. And the name of that employee?

A. Jack Hagopian.

Q. That is the same Jack Hagopian who testified here today? A. That is right.

Q. Was he a member of the Union at that time?

A. He was on a permit card.

Q. What does that mean?

A. That means that he is only given a certain time to work, the permit card is revocable at any time; also, that the permit card does not allow him to work any other place but at the place to where it was issued to.

Q. Is that so stated on the permit?

(Testimony of Henry Pat Savin.)

A. No, it doesn't state, but that is the understanding when the permit card is issued then.

Mr. Magor: All right. Just a moment, then. In that case I will move to strike it out. Self-serving testimony. [334]

Mr. Davis: Perhaps we can clear this up by rephrasing. I don't want that answer either.

Trial Examiner Bennett: Granted.

Q. (By Mr. Davis): Did you tell Mr. Hagopian those were the conditions under which he had the permit?

A. Yes, that the permit card was issued to him to work at Rose Misuraca's place.

Trial Examiner Bennett: Was he an applicant for Union membership?

The Witness: He is a suspended member.

Q. (By Mr. Davis): And why had he been suspended? A. For non-payment of dues.

Trial Examiner Bennett: What is the procedure then? If you pay up your dues, you get reinstatement?

The Witness: For reinstatement, yes, sir, you have to pay up all your back dues, and new initiation fee for reinstatement. Just like coming in as a new member.

Q. (By Mr. Davis): Now, were you in the Crystal Palace Market on the morning that the picketing commenced? A. I was.

Q. Did you see Mr. Hagopian in the market that morning? A. I did.

Q. Where did you see him?

(Testimony of Henry Pat Savin.)

A. Working for Warren Gummow's.

Q. What was he doing? [335]

A. Working behind the counter, checking.

Q. And did you say anything to him?

A. I did.

Q. What did you say?

A. I asked him what he was doing there.

Q. Did he reply?

A. He didn't say anything to me.

Q. You stopped? A. I did.

Q. How long?

A. For about a second to talk to one of my members, Andrew — George Andrews was right there.

Q. He was also working for Mr. Gummow?

A. No, he wasn't. He was standing on the outside with his dress clothes on.

Q. He didn't have a smock on?

A. No, he didn't.

Q. Did he usually wear a smock?

A. They do.

Q. What did you say to him?

A. I said, "George, what are you doing?"

He said, "I am not working here, Pat."

I said, "What are you doing?"

He says, "Nothing."

With that, I walked out, and he followed me.

Q. Did you talk to him any further? A. No.

Q. Did you ask him to come outside?

A. I did not.

Trial Examiner Bennett: There has been some

(Testimony of Henry Pat Savin.)

testimony about your being assigned to the Grocery Local.

The Witness: Yes.

Trial Examiner Bennett: Will you explain that for us?

The Witness: I was given orders by my Secretary to help 648.

Trial Examiner Bennett: When did you get those orders?

The Witness: Prior to the establishing of pickets, when the pickets were being established, to help.

Trial Examiner Bennett: Can you set the date you got those instructions?

The Witness: Oh, that was on the date, the date that the pickets were established. I don't recall the exact date; it was that morning.

Trial Examiner Bennett: Very same morning.

Mr. Davis: I think there was some confusion, Mr. Examiner.

Q. (By Mr. Davis): What pickets are you referring to? At what establishment?

A. Not — pickets around the other place, not around the Crystal Palace Market.

If I understand the question right—— Are you [337] referring to the Crystal Palace Market or—— Well, I am——

Trial Examiner Bennett: I am interested in any event—correct me if I am in error—— You got instructions to report to the other Local when the over-all picketing started?

The Witness: That is right.

(Testimony of Henry Pat Savin.)

Trial Examiner Bennett: That was several weeks earlier?

The Witness: That is right.

Trial Examiner Bennett: And you had been on those duties all that time?

The Witness: That is right.

Trial Examiner Bennett: And that would be prior to February 12?

The Witness: That is right.

Mr. Davis: I think the record shows from Mr. Jinkerson's testimony that was February 3, Mr. Examiner.

Trial Examiner Bennett: I believe that is right.

Q. (By Mr. Davis): Now, returning to the morning of the 15th when you were in the Crystal Palace Market and saw Mr. Hagopian and Mr. Andrews, did you also see Mr. Gummow that morning? A. I did.

Q. Did you talk to him? A. No.

Q. Now, prior to the picketing at the Crystal Palace Market, or on the day of the picketing, or at any time after that, while the picketing was going on, did you give any instructions to your [338] members about working at the Crystal Palace Market? A. I did not.

Q. Who is Mr. Preciado?

A. He is the manager for Donabedian, DZD Produce.

Q. Did you have any conversation with him at any time during this morning?

A. He called me up one morning and wanted to

(Testimony of Henry Pat Savin.)

know if it was all right for him to go to work.

I told him I issued no order to anybody to go through the picket line; if he wanted to go to work it was strictly up to him.

Then he said something about it being finance troubles and he had a wife and children and needed money.

I said, "If you need aid, you come up to the office and the Union will take care of you."

And, with that, the conversation ended.

Q. Now, do you know a Jim Higgins?

A. I do.

Q. Who is he?

A. He was working on a permit card for Warren Gummow.

Q. This was the same type of permit Mr. Hagopian had been given?

A. No. This permit card gave him the right to only clean up and unload the truck. It gave him no right to trim or display the goods. That was the understanding that I had with Warren Gummow. [339] Also, understanding with Warren Gummow was that his hours were from nine to six.

Q. You made this agreement with Mr. Gummow? A. That is right.

Mr. Magor: I move to strike it out. In the first place, there has been no foundation laid for it. What sort of agreement? If it is written, why, it violates the parol evidence rule.

Trial Examiner Bennett: Would you clarify that?

(Testimony of Henry Pat Savin.)

Mr. Davis: Be glad to.

Q. (By Mr. Davis): When was Mr. Higgins hired by Mr. Gummow, approximately?

A. Oh, about four to six weeks prior to that.

Q. Did you have a conversation with Mr. Gummow when Mr. Higgins was hired?

A. I did.

Q. Where did it take place?

A. Right in the back of his warehouse there, on his premises.

Q. And what did you say to him and what did he say to you? Withdraw that.

Anyone else present?

A. I don't believe so.

Q. All right. Now, what did you say to him and what did he say to you?

A. Conversation with Warren Gummow was [340] relative to the contract, anyone placed on a permit card is to receive the same wages as the contract calls for. Also the observance of the working hours and working conditions.

Warren Gummow agreed to that.

It was on the strength of that that I issued a permit card.

Q. Did you discuss with him the hours that Mr. Higgins was to work?

A. I did. I also discussed it with Mr. Higgins, hours and wages that he was to receive.

Q. And did Mr. Gummow agree the hours would be nine to six? A. He did.

(Testimony of Henry Pat Savin.)

Q. Did he agree with the work Mr. Higgins was to do? A. He did.

Q. This was an oral agreement?

A. That is on the strength of the issuance of the permit card.

Trial Examiner Bennett: As I understand it, Gummow had hired Higgins himself?

The Witness: That is right, with my permission.

Trial Examiner Bennett: And you gave him a permit card when he started?

The Witness: That is right, for the simple reason that he was to be called in the Army any day, and I didn't feel like making an application for him on the strength he may be called today, tomorrow, or next week. [341]

Trial Examiner Bennett: I will deny the prior motion to strike.

Q. (By Mr. Davis): And where is Mr. Higgins now? A. In the Service.

Q. Mr. Gummow testified that you had a conversation with him on the morning the picket line commenced at about 8:00 a.m. and that you told—while in his presence, you told Mr. Higgins to drop his knife and get out.

A. I don't recall any such statement.

Q. Well, did you have any such conversation at all? A. I did not.

Q. Do you recall seeing Mr. Higgins that morning? A. Not to my knowledge.

Q. Were you in there at eight or before that morning?

(Testimony of Henry Pat Savin.)

A. I don't recall. I could have been.

Q. Now, at a time which may be one or two days prior to the time the pickets were taken off, there is testimony that the Union was called for help and the request was made that George Andrews be permitted to come back to work.

Do you recall anything about that? A. Yes.

Q. How did that come about, to your knowledge?

A. Yes. He had called up Jack Goldberger, President of the San Francisco Labor Council, and Jack Goldberger called me up and told me that Warren Gummow's wife had been taken seriously [342] ill and they took her to the hospital, and Warren Gummow wanted to go and see her. He had nobody to take his place. And that if I would permit George Andrews to go to work there.

I said I would.

I saw George Andrews the next morning and says, "George, if you want to go to work, it is all right with me," and which he did.

Q. Now, Mr. Savin, on the day and several days immediately following the time the pickets were put on at the Crystal Palace Market, did you talk to your members who were regular employees in the market about how they happened to be out of work? Did you have any conversations or meetings with your members after the pickets were placed on the Crystal Palace Market? A. No, I didn't.

Trial Examiner Bennett: Were you present at the picket line at all?

(Testimony of Henry Pat Savin.)

The Witness: Oh, once in a while I would be around.

Trial Examiner Bennett: How often?

The Witness: Maybe two or three times, very short.

Trial Examiner Bennett: Is this daily or what?

The Witness: No.

Trial Examiner Bennett: Two or three times during the——

The Witness: I would drive by with my car and [344] then keep on going. Sometimes I would stop and get out. Most of the time I drove by and just kept on going.

Mr. Davis: I think that is all.

Cross Examination

Q. (By Mr. Magor): You say you had a conversation with Mr. Preciado? A. Who?

Q. Mr. Preciado? A. Preciado.

Q. He is manager of DZD, is that correct?

A. That is right.

Q. Will you tell us the full conversation you had with him?

A. He called me up at my home around nine o'clock or so and wanted to know if I would give him permission to cross through the picket line and go to work; that he was in need of finances, that he had bills to pay.

I said I issue nobody any orders to go through the picket line; if he wanted to go through the picket line, it was up to him and I couldn't stop him; if he needed aid, to come up to the Union and

(Testimony of Henry Pat Savin.)

we would take care of him. The conversation ended.

Q. He called you up for permission to go through the picket line? A. Yes.

Mr. Davis: And you gave the answer to him you have just given? [344]

I am sorry, I thought you had finished.

Trial Examiner Bennett: He was a member of your Union?

The Witness: Yes.

Mr. Magor: That is all.

Mr. Davis: That is all, Mr. Savin. Thank you.

(Witness excused.)

Mr. Davis: Mr. Brodke.

ALLEN BRODKE

a witness called by and on behalf of the Respondents, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Davis): What is your name, Mr. Brodke? A. Allen Brodke.

Q. Where do you live?

A. 1341 Bay Street, San Francisco, California.

Q. And your occupation?

A. Secretary-Treasurer of the Retail Fruit and Vegetable Clerks Local 1017.

Q. How long have you held that position?

A. Since 1936.

Q. You have been present in the Hearing Room during this proceeding, you have heard the testimony? A. I have.

(Testimony of Allen Brodke.)

Q. Do you recall having a conversation with Mr. Gummow some time after the pickets were established at the Crystal Palace Market? [345]

A. Yes. I had a couple of conversations with him on different days.

Q. Well, when was the first one?

A. The morning the picket line was established. Are you referring after the picket line was established?

Q. Yes, after it was established.

A. The morning that the picket line was established.

Q. About what time?

A. Well, I imagine it was before eight o'clock.

Q. And where was Mr. Gummow when you had this conversation with him?

A. Well, I think I was standing outside of that area where the trucks enter.

Q. Was anyone else present?

A. Well, there were pickets there.

Q. And what was the conversation?

A. Mr. Gummow asked me if I would give him permission to have a couple of his men take merchandise and put it in the ice box and on his truck.

I said I couldn't give him that permission, that I had nothing to do with the picket lines, but I would go with him and introduce him to the picket captain, which I did, and the picket captain granted him permission for a couple of men to work there to get his merchandise on the truck or in the ice [346] box so it wouldn't spoil.

(Testimony of Allen Brodke.)

Q. And those men did work? A. Pardon?

Q. And he did have those men work for him?

A. Those men worked about a couple of hours.

Q. Now, on the second day of the picket line, did you have another conversation with Mr. Gummow? A. I did.

Q. About what time was that?

A. Seven o'clock in the morning.

Q. And where was Mr. Gummow on this occasion?

A. Right at the same entrance. He was coming down 8th Street.

Q. And what did you say to Mr. Gummow and what did he say to you?

A. I told Mr. Gummow that there was a fellow working in there before seven o'clock that I don't know; he was not a member of the Union. I had asked him what he was doing in there and this person says to me, "The boss told me to come in and go to work."

So I said to him, I said, "You know you are violating the contract by working before seven o'clock."

He says, "I don't know anything about the contract," he says, "the boss told me to come to work and here I am."

So I turned away and left him. Then a short while after about fifteen or twenty minutes later, [347] Gummow came down the street and I asked him who that person was in there working at his stand.

(Testimony of Allen Brodke.)

He says, "There is nobody working in my stand."

I says, "Oh, yes, there is. This fellow working in there told me that you told him to report to work.

He says, "I did no such thing. There is nobody supposed to be in there."

I says, "O.K. I will take your word for it."

That finished the conversation with Mr. Gummow that morning.

Q. Did Mr. Gummow and this other man that you didn't know give you the name of the man that was in there working? A. No.

Q. Could his name have been Jim Higgins?

A. I learned afterwards that that was his name.

Q. Did you have any conversation with Mr. Donabedian during the course of this dispute?

A. Yes.

Q. When?

A. Well, I think it was the third day of the strike, or Thursday morning, which would be about the 17th of February. The day before he had hired a non-Union person to work in his establishment and I heard about it. Someone gave me the phone message. And I went down to the market and I saw Rose Misuraca waiting on trade. [348]

Q. Was she a member of your Union?

A. She was not.

The next morning I told—that same evening I told Eric Lyons that I was going down to the market to see if I couldn't straighten out Mr. Donabedian.

He said, "O.K. What time you going down?"

(Testimony of Allen Brodke.)

I says, "Well, I will be down there about four o'clock in the morning. I will probably see some other employers and have breakfast and conversation with them," which I usually do once a week.

Q. When you say "the market," do you mean the produce, commission market, wholesale?

A. Commission market.

Q. Commission market. O.K. Did you go down that morning?

A. I went down that morning. Eric Lyons came down there with another fellow by the name of Bedini. And about five minutes to six we put on our picket banners and picketed the back end of Mr. Donabedian's truck.

Q. Why did you do that?

A. Well, he had violated our contract.

Trial Examiner Bennett: How?

The Witness: By not calling the office for Union help.

Trial Examiner Bennett: You objected to him employing someone who is not a Union member; is that correct?

The Witness: That is right. Our people should [349] be given preference for employment, according to the contract.

So, after being at the back end of Mr. Donabedian's truck, he came up, called me a few names and mentioned things that were a little derogatory about my ancestors. Said, "I am your friend. I used to belong to the Union. Do you remember me? You are my friend, supposedly."

(Testimony of Allen Brodke.)

So I told him, I says that he is not treating me right by not observing the contract.

He turned around, walked down the street; he came back up with three or four packages in a hand-truck.

When he done that, I contacted the Business Representative of the Produce Drivers and Salesmen and I asked him if people outside of his Union were allowed to use the hand-trucks.

He says, "No. Who done that?"

I says, "This fellow Donabedian."

So he came around the corner with me, talked to Donabedian, and told him to keep his hands off of those trucks, that that was a tool of his people, no one else was supposed to use those trucks.

Then Donabedian turned to me, and a little more conversation that I wouldn't like to repeat, and I just turned my back on him and didn't answer him.

He turned and walked away. He was back in about five minutes. He says, "Al," he says, "if I let this woman go," he says, "will you take the pickets off?" [350]

I said, "Don, if you promise me you won't hire any non-Union help, I will take the pickets off."

He says, "O.K., I agree."

So I told the pickets, "Come on, boys, let's go; we are all through here."

I, later that day, went up to the Crystal Palace Market. He had a man cleaning up outside of his warehouse.

I walked into the market and I said, "Don, I

(Testimony of Allen Brodke.)

thought you told me you wouldn't hire any non-Union help."

He says, "Oh, he is just cleaning up outside."

I says, "Look, that is part of our work. He is non-Union. You promised me this morning you wouldn't hire those kind of people."

He says, "O.K., Al; I will let him go."

With that, I walked out.

Q. Do you know the name of this second man?

A. No, I don't. He was referred to as a "Wino."

Q. All right. Now, Mr. Brodke, did you give any instructions to your members working at the Crystal Palace Market at any time with regard to crossing the Grocery Clerks' picket line?

A. Instructions?

Q. Yes. A. No, sir.

Q. Did you have any conversations with any of [351] them about crossing the picket line?

A. About crossing the picket line?

Q. Yes. This picket line at the Crystal Palace Market.

A. I had conversations with my people that were observing the picket line while I was there. My men was—came up to me and would say to me in this kind of voice, "Hello, Al, what's doing?"

"Well, pretty good picket line around here."

That was my reply.

Trial Examiner Bennett: How often were you there at the picket line?

The Witness: I was there every day.

(Testimony of Allen Brodke.)

Trial Examiner Bennett: For how long, would you say?

The Witness: Up until the pickets were taken off.

Q. (By Mr. Davis): But he means—I think the Trial Examiner means how long a time each day?

A. How long a time. Well, the first day——

Trial Examiner Bennett: I'm talking about Crystal Palace now.

The Witness: I am, too.

Trial Examiner Bennett: Fine.

The Witness: The first day I arrived down there a little after six.

Trial Examiner Bennett: I don't want an exact time schedule, just roughly how much time you spent there. [352]

The Witness: Well, the first day I imagine I spent about six or seven hours through the day.

The second day, maybe two or three hours, and so on.

Q. (By Mr. Davis): In what capacity were you present there? A. Strictly as an observer.

Q. Did you wear any insignia or banner of any kind? A. No.

Q. Did you march with the pickets?

A. Well, I joined in the picket line, I talked—I was talking with one of the pickets, and I walked up and down about two or three minutes during the conversation.

Q. That was on one occasion?

A. That is all, one occasion.

(Testimony of Allen Brodke.)

Trial Examiner Bennett: Was it one of your members, or otherwise?

The Witness: No. It was one of the members of 648 that was a former member of ours, that had transferred into the Grocery Clerks Union.

Q. (By Mr. Davis): Now, did you have occasion at any time after the picket line was placed at the Crystal Palace Market to discuss with your members who had been working in there the circumstances of their not going to work? On the 15th?

A. Well, I called a meeting. Do you have my folder there?

Mr. Davis: Do you want this?

Trial Examiner Bennett: Just so there will be no doubt about it, before the witness starts looking [353] at documents on the stand, if he does look at these documents, opposing Counsel has the right to inspect whatever the witness inspects. I am putting the witness on notice before he starts going through his file.

Mr. Davis: Thank you, Mr. Examiner.

A. (Continuing): On February 21, I sent out a communication stating as follows:

"Dear Member: If you are out of work due to a lock-out or picket line, you are requested to attend a meeting Thursday afternoon at 2:00 p.m. in Room 916, Pacific Building, 821 Market Street. This meeting is very important and you should make it your business to attend.

"Hoping to see you at the meeting, I am, Fra-

(Testimony of Allen Brodke.)

ternally yours, Allen Brodke, Secretary-Treasurer."

And here I have the list of names of all those people that attended that meeting, thirty-nine.

Q. (By Mr. Davis): And in that list are included the employees, your members who work at the Crystal Palace Market?

A. There were some people that worked at the Crystal Palace Market.

Q. Did you ascertain from these members that worked at the Crystal Palace Market why they were not working after February 15?

Mr. Magor: Just a moment. I am going to object to that on the grounds it is leading and suggestive and calls for hearsay. [354]

Trial Examiner Bennett: Rephrase the question.

Mr. Magor: Also self-serving.

Mr. Davis: Is Counsel through?

Mr. Magor: Right now I am.

Q. (By Mr. Davis): What occurred at this meeting—— Withdraw that.

Who was present, besides the——

A. At this meeting were present these thirty-nine members, myself, Pat Savin, and Roland Davis.

Q. That is your present interrogator?

A. That is right.

Q. What occurred at the meeting?

A. Well, we had a mimeographed sheet we passed out to every member requesting certain information as to why they were laid off or what

(Testimony of Allen Brodke.)

their employers said when they were laid off, if they were laid off.

Q. These forms were completed by the members at the meeting? A. Yes.

Q. Were they signed by the members?

A. Yes.

Q. And what do those forms show with respect to the employees at the Crystal Palace Market?

Mr. Magor: Before we have any testimony, I would like to see the—— [355]

Trial Examiner Bennett: The witness has turned over the documents to Mr. Magor.

The Witness: I got a few more here.

Mr. Davis: Proceed, Mr. Brodke.

Trial Examiner Bennett: Do you have the question in mind?

The Witness: No, I don't.

Trial Examiner Bennett: Let's have another question.

Q. (By Mr. Davis): Mr. Brodke, from an examination of that information turned in to you by the Union members, can you state the reasons given as to why they were not at work at the Crystal Palace Market after February 15?

Mr. Magor: Just a minute. To which I object on the grounds there has been no proper foundation laid for this, hearsay.

Trial Examiner Bennett: I believe it would be hearsay as to what actually happened at their respective places of employment.

Mr. Davis: We are attempting to save a little

(Testimony of Allen Brodke.)

time, Mr. Examiner. If Counsel wants to be technical, technically he is correct.

We can show through these employees that they were laid off by the Employer prior to any picket line. Obviously, Counsel doesn't want to have that material in the record.

Trial Examiner Bennett: If you are offering it to show on what hypothesis the witness relied upon, [356] I will allow it, but if you are offering it to prove the basic premise, as I gather you are, the objection is well taken.

Mr. Davis: No further questions.

Trial Examiner Bennett: I just have one question I would like to ask you.

Was it you who assigned Mr. Savin to Local 648?

The Witness: Yes.

Trial Examiner Bennett: When was that assignment made?

The Witness: The first day of the strike.

Trial Examiner Bennett: Can you tell us——

The Witness: When was that, February 3? I think that was the date, or 4.

Trial Examiner Bennett: Was there any conversation on that occasion?

The Witness: No. It just so happened that Pat was recuperating from an operation and I was doing most of his work in the field for about six weeks or so prior to the strike, and he was feeling a little better, so I says, "Well, take a run over to 648. Maybe they might need a little manpower.

(Testimony of Allen Brodke.)

The Business Agents will be out signing agreements. Maybe they can use you."

Trial Examiner Bennett: That is all.

Cross Examination

Q. (By Mr. Magor): Do you normally go down to the Crystal Market yourself in the course of your duties, Mr. Brodke? [357]

A. Normally? No, I don't.

Q. But on the morning that the picket line was established, you were down there at six o'clock in the morning; is that correct? A. That is right.

Q. What was your purpose in being down there at six o'clock in the morning when the picket line went up?

A. Well, I wanted to see what was doing down there.

Mr. Magor: That is all.

Mr. Davis: No questions.

Trial Examiner Bennett: You are excused.

(Witness excused.)

Trial Examiner Bennett: We will take a five minute recess.

Mr. Davis: Before we do that, Mr. Examiner, I think we are about prepared to rest. Unless you want to recess right this minute, I think we ought to——

Trial Examiner Bennett: Off the record.

(Discussion off the record.)

Trial Examiner Bennett: We will have a short recess.

(Short recess.)

Trial Examiner Bennett: On the record.

Mr. Davis: Mr. Jinkerson.

CLAUDE JINKERSON

recalled as a witness by and on behalf of the Respondents [358] having been previously duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Davis): Mr. Jinkerson, during the course of your dispute with the grocers in San Francisco, commencing on approximately February 3, 1955, did you have occasion to use the assistance of Union representatives from other Unions to assist Local 648 in this dispute?

A. Yes. We had from ten to thirty there during all times.

Q. And these were representatives of other Unions?

A. They were representatives of Retail Clerks Unions from Fresno north.

Q. And what kind of work did these Union representatives do for you?

A. They were to assist the field representatives in getting signed contracts.

February 2nd, after first signing up contracts, we ended up with thirty that first day. Figuring 592 Employers, figuring the Business Agents could only pick up fifteen to twenty a day on an average, it was a manpower problem.

So, we asked Larry Vail, Secretary of the State Council, to call in all of the available representatives from Fresno north to help us out.

(Testimony of Claude Jinkerson.)

Q. And, in this work, they were acting as representatives of Local 648; is that right? [359]

A. That is right.

Q. And that was the capacity in which Mr. Savin assisted your organization?

A. That is right.

Trial Examiner Bennett: Was that the only capacity in which he functioned?

The Witness: That is right.

Mr. Davis: That is all.

Trial Examiner Bennett: That is all.

(Witness excused.)

Mr. Davis: At this time, Mr. Examiner, I should like to renew my motion to dismiss the Complaint.

As I have indicated off the record, I base that renewal of the motion upon the theories and the facts, theories expressed and facts referred to in my argument of this morning, as well as the testimony which has come in in connection with the Respondents, testimony and exhibits which have come in in connection with Respondents' Reply.

I don't want to go into detail in discussing that testimony. I think it simply supports, without any question, the view, our view of the case expressed this morning. I think that the testimony refutes any evidence that was attempted to be offered with respect to coercion or inducement, unlawful encouragement on the part of representatives of Local 1017 with respect to the crossing of the picket line.

I think testimony of Mr. Jinkerson supports the theories that I earlier expressed with respect to the

nature of the dispute, the nature of the picketing and its purpose.

And I would also simply in closing ask the Trial Examiner to review the pictures which are in evidence, and particularly the pictures showing the interior of this market in connection with the argument which we have made that picketing inside of this market is neither—would neither be effective nor reasonable under the circumstances and is not required by any provisions of the law or any decisions of the Board. And particularly in connection with this market these pictures show without any question from two angles which we tried to show the Examiner, both the close-up and from a distance, what confusion could be created by pickets parading in these narrow aisles in among the piled-up merchandise throughout the market, and if that is Counsel for General Counsel's only theory—you will recall this morning he only referred to this matter of the Union's alleged refusal to picket inside the market as establishing the basis for his case—then I submit to you the unreasonableness and lack of any precedent for such a theory that a Union, or under these circumstances or similar circumstances which I have referred to, you would have to picket in and about aisles, stands, boxes of merchandise, fruit and vegetables, in order to effectively carry on a primary boycott, assuming that there is such a situation here in the [361] first place, which I pointed out I don't believe exists.

That is all.

Trial Examiner Bennett: I have in mind your prior argument as well, and I reserve ruling.

Do you rest at this time?

Mr. Davis: Yes. We rest.

Trial Examiner Bennett: General Counsel have any rebuttal?

Mr. Magor: I have no further rebuttal in this matter, or no rebuttal in this matter.

Trial Examiner Bennett: There is one exhibit, namely No. 11, on which ruling was reserved. Do you wish to renew the offer?

Mr. Magor: I re-offer it, Mr. Trial Examiner, and whether the facts or evidence in this matter indicate—which is something to be determined by you, whether Respondents' Local 648 actually received General Counsel's Exhibit 11, nevertheless, the facts stand that those are lists or further lists of employers who were members of the Grocers Association and had given Powers-of-Attorney to the Grocers Association to represent them.

Trial Examiner Bennett: Do you still press your objection to No. 11?

Mr. Davis: Yes.

Trial Examiner Bennett: I will sustain the objection.

Mr. Magor: Can that go in the rejected exhibit file? [362]

Trial Examiner Bennett: All right.

(The document heretofore marked General Counsel's Exhibit No. 11 for identification was rejected.)

Trial Examiner Bennett: Counsel have indicated

in the off-the-record discussion that they do not wish to file briefs, and I don't particularly want oral argument, inasmuch as I have had a fairly complete exposition, particularly from Respondents.

I would like Mr. Magor to sum up very briefly in a matter of minutes in essence what his position is. By that I mean three or four or five minutes.

Mr. Magor: I will try that, as briefly as possible.

Number one, Mr. Trial Examiner, the position of General Counsel in this matter is that jurisdiction that the Board would and should exercise is based upon the commerce facts of the Grocers Association.

Trial Examiner Bennett: I am more interested in the merits.

Mr. Magor: All right. I will move, then, to the merits.

I have briefly pointed out to you this morning the criteria laid down by the Board in their Moore Dry Dock decision and the four criteria that have set the pattern for these common situs picketing situations. At least two of the incidents that must be met to show that the picketing is primary and not secondary is that at the time of picketing the [363] primary Employer involved must be engaged in his normal business at the situs of the dispute. The facts in evidence in this case show that the two particular disputants with which Local 648 had a grievance were the J. M. Long Grocery Company in the Crystal Palace Market and the Standard Groceteria. And at the time, since January 3, actually, until the time that the dispute was set-

tled, neither one of those stores were operating. They had no employees working in the Crystal Palace Market, as Mr. Green testified, or Mr. Haag. The shutters or the blinds were pulled down on Standard Groceteria. The operations were closed up.

Another incident that must be met is that picketing must be as reasonably close to the situs of the dispute as possible. Now, we have seen in this case that Mr. Haag, the representative of J. M. Long Company, invited Local 648 to come in and picket at the places inside which they had a dispute. And his purpose in so doing was that the other lessees or tenants of the market were not thereby hurt.

However, Local 648 turned this down, and instead placed their pickets at all entrances to the market, including the driveway entrance, the parking lot entrance. Now those facts are essential, Mr. Trial Examiner, to show although the signs may have clearly identified the disputants as being J. M. Long and Standard Groceteria, we have to look for the other evidence to show whether or not that was the primary dispute, and the [364] evidence shows clearly that the reason that they placed the pickets outside was because they would not have the economic pressure that they desired.

The pressure they desired was to induce or encourage employees of the other employers in the market, and more particularly, employees and members of Local 1017 of the Fruit Association in the market, not to cross the picket line. Now, that is the theory and position of the General Counsel with respect to Local 648, that they did not meet the

requirements of the common situs picketing as laid out by the Board with Court approval.

Trial Examiner Bennett: Stopping right there, if you say in part at least it was directed at the members of Local 1017 who worked in the market, what was the ultimate objective they were seeking?

Mr. Magor: The ultimate objective was that they put the pressure on those employers, Gummow and DZD, to cease doing business with J. M. Long.

Trial Examiner Bennett: And in Long's capacity as landlord?

Mr. Magor: As landlord and lessor of the premises.

Trial Examiner Bennett: All right.

Mr. Magor: Now, secondly, as I have outlined this morning, the position of the General Counsel with respect to 1017 is that they induced and encouraged members of the Fruit Association [365] employed in the market not to cross the picket line. We have testimony in that respect from Mr. Gummow, who was on the stand this morning, with respect to Mr. Higgins, with respect to Mr. Hagopian, and there is a question of credibility in that respect which has to be resolved by the Trial Examiner. And with respect to his manager who was standing there and ordered by Pat Savin to get out of the store.

As I said before, inducement and encouragement is very broad. It can be a wink or a nod. Counsel raised the legal point this morning that it could be protected by 8(c). I think that point has been cited quite some time ago when the Unions urged that

picketing itself, even though it might have violated 8(b)(4), of the provisions of Section 8(b)(4), it was protected by 8(c).

Now, surely, picketing can be peaceful and actually, primarily, is protected by 8(c), but the Supreme Court has held, as well as other Courts and the Board, that there can be a dual purpose in picketing, and that certain aspects of it may be primary and peaceful, but other aspects are the portions of the picketing that has been prescribed by Congress under Section 8(b)(4)(A) of the Act and it is not protected by Section 8(c).

Now, with respect to the pictures that Counsel has introduced this afternoon, Respondents' No. 13 and No. 14, I might point out at this time, Mr. Trial Examiner, that those [366] pictures, although they are pictures of the market and certain of the stands in the market, are not photographs of the actual disputants that we are concerned with or the people that we are concerned with in this matter, J. M. Long and Standard Groceteria. The principal one in Respondents' Exhibit 13 shows Herod's Crystal Palace, Department 55. And Respondents' Exhibit 14, the clearest visual one there is apparently some cafeteria in the market.

I think I have probably used up my three minutes. If you have any further questions——

Trial Examiner Bennett: No, I didn't have anything further.

Mr. Magor: I submit the matter, Mr. Trial Examiner.

The only motion I would like to make at this

time is a motion to conform the pleadings to the proof with respect to informal matters such as spelling of names and so forth, and two that have become most prominent in my mind is the correct name of Gummow's operations, which is, from his testimony this afternoon, he had two operations there, which is at variance with the Complaint, and the other one is B. Mastorana. I think that name is incorrectly spelled, which is Peninsula Fruit Company.

Trial Examiner Bennett: Do you have the correct spelling?

Mr. Magor: It was testified to by Mr. Haag in his testimony. [367]

Trial Examiner Bennett: Any objection?

Mr. Davis: No.

Trial Examiner Bennett: Motion is granted.

The parties have waived briefs.

In due course I shall prepare and file with the Board an intermediate report and recommended Order in this proceeding and will cause a copy thereof to be served upon each of the parties.

Upon filing of the report and Order, the Board will enter an Order transferring this case to itself and will serve copies of that Order setting forth the date of such transfer upon all parties. At that point, my official connection with this case will cease.

The procedure to be followed before the Board from that point forward with respect to the filing of exceptions to the intermediate report, the submission of supporting briefs, requests for oral argu-

ment before the Board, and related matters are set forth in the Board's Rules and Regulations. A summary of the more pertinent of these provisions will be served upon the parties together with the Order transferring the case to the Board.

Do the parties have anything further?

Mr. Magor: I have nothing further.

Mr. Davis: Nothing further.

Trial Examiner Bennett: There being nothing [368] further, the hearing is now closed.

(Whereupon, at 4:15 o'clock, p.m., Tuesday, May 24, 1955, the hearing in the above-entitled matter was closed.) [369]

Certificate

This is to certify that the attached proceedings before the National Labor Relations Board for the 20th Region in the matter of: Retail Fruit and Vegetable Clerks' Union No. 1017, Grocery Clerks' Union No. 648 and Retail Fruit Dealers' Association of San Francisco, Inc., Case No. 20-CC-106, were had as therein appears, and that this is the original transcript thereof for the files of the Board.

ACME REPORTING COMPANY,
Official Reporters
/s/ By KEMBLE AUTZ,
Field Reporter

No. 15,298

IN THE

United States Court of Appeals

For the Ninth Circuit

RETAIL FRUIT & VEGETABLE CLERKS UNION, LOCAL 1017, and RETAIL GROCERY CLERKS UNION, LOCAL 648, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Review and Set Aside an Order of the National Labor Relations Board.

BRIEF FOR PETITIONERS.

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BRIEF FOR PETITIONERS.

JURISDICTION.

This case is before the Court on a petition (R. 101-105) to review and set aside an order of the National Labor Relations Board (R. 76-78) issued against petitioners on August 24, 1956, following the usual proceedings under Section 10 of the National Labor Relations Act, 61 Stat. 146 (1947), 29 USC § 160 (1952).

The Board in its answer to the petition requested enforcement of its order (R. 105-110). The events giving rise to the alleged unfair labor practice took place in the City of San Francisco, California, within this judicial circuit. This Court has jurisdiction by virtue of Section 10(e) and (f) of the Act. The Board's decision and order is reprinted in the transcript of record, pages 63-98.

STATEMENT OF THE CASE.

In the early part of 1955 petitioner Retail Grocery Clerks Union, Local 648 (hereinafter referred to as Local 648) was engaged in a labor dispute with various operators of grocery stores in the City of San Francisco. The subject of the dispute concerned the terms of a new collective bargaining agreement covering employees represented by Local 648 employed by the aforementioned grocery operators. A large number of employers involved in the said labor dispute were represented by the Retail Grocers' Association of San Francisco. This association, which claims to be the bargaining agent for about 275 to 300 members who operate about 360 stores (R. 161), has engaged in association-wide bargaining with Local 648 since 1937 (R. 127). The last agreement between the parties prior to the instant dispute expired on January 1, 1955 (R. 124). The first in a series of bargaining sessions relative to a new agreement was held on November 10, 1954 (R. 130). After a number of meet-

ings at which no agreement was reached, negotiations between the parties broke down on January 25, 1955 (R. 146). Picketing of two stores operated by members of the Association commenced on or about February 3, 1955 (R. 148, 361-362). Immediately thereafter a strike and lockout condition existed throughout the San Francisco grocery industry caused by a program announced by the Association that a strike against one of their members would be considered a strike against all, which resulted in a number of grocery operators laying off their employees (R. 146, 148, 150). By February 12, 1955, about 129 operating grocers in San Francisco still had not signed a new agreement (R. 406). Strike and lockout conditions continued until February 24, 1955 (R. 195).

Among the firms represented by the Retail Grocers' Association was J. M. Long and Co., Inc., which owned and operated the Crystal Palace Market, located at 8th and Market Streets in San Francisco. In addition to owning the market as a whole (R. 170), J. M. Long and Co. directly operated in the market a grocery department, an appliance-sport shop-housewares department, two liquor, tobacco and magazine departments, a grocery warehouse, a carpenter shop, general offices and a large free parking area (General Counsel's Exhibit 19; R. 167, 210, 219-221, 241). The remainder of the sixty-four departments which exist in the Crystal Palace Market (R. 169) are operated by other individuals under a so-called "minimum and percentage" lease arrangement under which the operators of these departments pay to J. M. Long

and Co. monthly a fixed sum plus a percentage of their gross sales (R. 197). The length of the terms of these agreements is from month to month, subject to cancellation on thirty days' notice. Long handles the advertising for the whole market. It also has the right to enter any department to see that it is being properly conducted and to audit the books of the operators of the departments (R. 197-198).

In addition to the grocery department operated directly by J. M. Long and Co., there were six or more other grocery and delicatessen departments in the Crystal Palace Market whose operators employed members of Local 648 and had theretofore maintained collective bargaining relations with it. Some but not all of these operators were also represented by the Retail Grocers' Association (R. 151-153, 154-160, 387, 393-394, 411-412). Among the grocery operators who followed the instructions issued by the Grocers' Association on February 3 that members of Local 648 should be locked out were J. M. Long and Co. for the grocery department which they directly operated and the Standard Groceteria, another grocery operator in the Crystal Palace Market (R. 162, 182-183). The other grocery and delicatessen operators in the Crystal Palace Market intermittently closed and opened their departments during the first two weeks after the strike and lockout condition commenced (R. 184, 359). All other departments in the Crystal Palace Market, whether operated directly by J. M. Long and Co. or by others, continued to operate as usual throughout this period.

On Saturday, February 12, 1955, Local 648, acting through one of its business representatives, Mr. Eric Lyons, sought clarification from the operators of the grocery and delicatessen departments in the Crystal Palace Market as to whether they intended to sign the union contract and to reemploy members of Local 648 and reopen for business (R. 357-358, 410-413). On that occasion three operators signed the proferred contract (R. 411). Later on the same day a meeting was held between a number of the grocery operators in the Crystal Palace Market, and two officials of J. M. Long and Co., Mr. John E. Green, General Merchandise Manager of J. M. Long and Co. in charge of their retail operations in the Crystal Palace Market, and Mr. Sidney A. Haag, vice-president of J. M. Long and Co. and general manager of the Crystal Palace Market (R. 184-186, 216). During this meeting Mr. Haag informed the other operators that he would not permit them to open on the following Monday or to operate during the course of the labor dispute between the Grocers' Association and Local 648 (R. 186, 202, 216).

Thereafter, Mr. Claude Jinkerson, the secretary of Local 648, requested a meeting with Mr. Haag for Monday, February 14, and on that day Mr. Haag met in his office with Mr. Jinkerson and a number of representatives of other unions (R. 358, 187, 217). Mr. Jinkerson asked Mr. Haag why J. M. Long and Co. was unwilling to sign the contract and why the other grocery and delicatessen operators in the market were not permitted to operate. There followed a dis-

cussion of the dispute and the place of J. M. Long and Co. in that dispute (R. 188, 359-360).

At this meeting some conversation took place concerning possible picketing of the Crystal Palace Market and where that picketing should be done, as to which the record is in conflict. Mr. Haag testified that he pointed out that the affected stands were closed and that he, therefore, thought that there was no need to picket the Market at all. He reminded Mr. Jinkerson that he was present some years earlier when there was a dispute with another union, at which time Mr. Haag suggested that the pickets come inside the Market and picket the affected departments, and he stated that he would permit this again although he saw little reason for it as long as the departments were closed. According to Mr. Haag, Mr. Jinkerson rejected this notion, stating that it would not give him sufficient economic force (R. 188-189, 199-200).[1]

Mr. Jinkerson in his testimony denied that any invitation was extended to bring the picketing inside (R. 401). He stated that Mr. Haag reminded him that on previous occasions when Mr. Jinkerson had served on union committees he had invited pickets to come inside. Mr. Jinkerson further testified:

> "I said, 'Yes, I have served on this kind of committee. In this case, where J. M. Long have

[1]On direct examination Mr. Haag stated that Mr. Jinkerson said "that that wouldn't give him the economic force he needed . . ." (R. 188-189.) On cross-examination he reported that the words were "it would not give him the economic pressure he wanted." (R. 200.) Mr. Green, who was also present at the meeting, testified that Mr. Jinkerson claimed that "it wouldn't give them the necessary economic pressure or whatever he was seeking to obtain." (R. 219.)

locked out the Grocery Clerks, I think that would be ridiculous.'

He said, 'I agree with you.'

Q. (By Mr. Davis.) Mr. Haag said, 'I agree with you?'

A. He said, 'I agree with you.' He said, 'I don't think it would give you the economic strength that you might desire.'

I said, 'Not looking to that at all, Mr. Haag. The thing we look to is that you control the situation in the Crystal Palace Market . . .'" (R. 360).[2]

There is no further conflict as to what occurred. Mr. Jinkerson advised Mr. Haag that in the event J. M. Long and Co. continued to refuse to sign the contract, and to permit other grocery stands to operate, Local 648 intended to advertise to the public that J. M. Long and Co. was unfair (R. 361). Mr. Haag advised Mr. Jinkerson later the same day that J. M. Long and Co. would continue to support the

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[2]The cross-examination on this point reads as follows:

"Q. Now, what was it Mr. Haag said about picketing inside the market?

A. It was, 'Mr. Jinkerson, you have served on previous committees that visited me,' he said, 'you have probably heard me offer that picketing should be done inside the market.'

I said, 'Yes, I have served on committees and I heard you make that remark. In this case, it would be ridiculous because J. M. Long & Company has locked out the Grocery Clerks.'

Q. What else was said?

A. What else was said after that?

He said, 'Well, I agree with you. When you talk about these people walking up and down in front of a locked-out place I agree it would look ridiculous and it probably wouldn't give you the economic strength that you would desire.'" (R. 400-401.)

position of the Asssociation and that nothing would be gained from further conversations (R. 189, 362).

Thereupon, on Tuesday morning, February 15, pickets were placed by Local 648 at all entrances to the Crystal Palace Market (R. 190-192, 363, 394). The pickets prominently displayed signs which read:

J. M. LONG AND CO.
UNFAIR
GROCERY CLERKS UNION, A.F.L.

Sponsored by S. F. Labor Council

Another sign similarly identified Standard Groceteria as being unfair to the Grocery Clerks Union (Resp. Ex. Nos. 2-8; R. 365-367, 192-193).[3]

Peaceful picketing continued at all entrances until February 24 (R. 195). Throughout the period of the picketing J. M. Long and Co. continued to conduct all its operations, other than the grocery department, in the Crystal Palace Market. Throughout this period also other employees at the Crystal Palace Market, members of other unions, crossed the picket lines and continued to do their regular work (R. 395, 406). Some other employees, including members of Retail Fruit and Vegetable Clerks Union, Local 1017 (hereafter referred to as Local 1017) refused to cross the picket lines.

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[3]The claim of one witness called by the General Counsel that for part of the morning of the first day of picketing there was one sign which did not specifically identify J. M. Long and Co. or Standard Groceteria (R. 272, 284) was rebutted on cross-examination (R. 284-295) and by Respondents' Exhibit No. 1 and was discounted by the Trial Examiner (R. 32). See, also, the testimony of Mr. Haag: "There were no other signs of any kind." (R. 193.)

Local 1017 has contracts with about five fruit and vegetable departments in the Crystal Palace Market who are represented for collective bargaining purposes by the Retail Fruit Dealers Association of San Francisco (R. 246, 417). There is no evidence that Local 1017 gave orders or instructions to its members not to cross the picket lines, and its officials specifically denied doing so (R. 423-424, 427-428, 435). Two officials of Local 1017, including one who since February 3 had been assigned to aid Local 648 in getting contracts signed (R. 213, 402, 422-423, 440, 443), were present at the scene of the picketing from time to time (R. 428, 435, 441). The day before the picketing commenced they also advised some of the employers with whom they had contracts to "buy light" since some people might refuse to cross the picket lines (R. 224, 225, 418-419).

A number of incidents are also alleged to have taken place at which it is claimed officials of Local 1017 tried to intimidate or prevent some persons from working at fruit and vegetable stands (R. 229-231, 304-307). Each of these incidents, except one, however, seems to have involved the employment of a non-union member or other violation of provisions of the collective bargaining agreement currently in effect between Local 1017 and the fruit and vegetable stand operators in the Crystal Palace Market (R. 230-231, 309-312, 314-315, 371-385, 419-421, 424-426, 431-434). The one other incident involved the manager of one of the stands, a union member. On the morning of the first day of the picketing he was inside the market, conversing with the operator

of the stand about the strike. The evidence indicates that he was not working at the time, was not dressed in his work clothes and was standing on the outside of the counter. The operator of the stand claimed that a union official came by and told the manager that he was not supposed to be there. The union official testified that he merely stopped, asked his member what he was doing and was told he was not working (R. 305-306, 313, 421).

Unfair labor practice charges were filed with the National Labor Relations Board by the Retail Fruit Dealers Association of San Francisco on February 16, 1955 (General Counsel's Exhibit No. 1-A; R. 1-2). The Board issued a complaint based on those unfair labor practice charges (General Counsel's Exhibit No. 1-C; R. 3-9). Petitioners filed an answer denying the charges and moved that the complaint be dismissed (General Counsel's Exhibits Nos. 1-G, I-H; R. 10-12). Hearings were held in San Francisco before Trial Examiner Martin S. Bennett on May 17, 18 and 24, 1955. On July 19, 1955, the trial examiner issued his intermediate report and recommended order finding that petitioners had violated Section 8(b)(4)(A) of the National Labor Relations Act (R. 13-61). Petitioners filed written exceptions to the trial examiner's report (R. 61-62). On August 24, 1956, the Board, with one member concurring specially and two members dissenting, issued a decision and order affirming the rulings of the trial examiner (R. 63-98).

Petitioners thereafter filed their petition for review with this Court (R. 101-105).

ARGUMENT.

I.

PEACEFUL PICKETING GROWING OUT OF A PRIMARY DISPUTE WITH A PRIMARY EMPLOYER IS PROTECTED BY THE NATIONAL LABOR RELATIONS ACT AND IS NOT RESTRICTED BY SECTION 8(b)(4)(A) OF THAT ACT.

When Congress adopted Section 8(b)(4)(A)[4] it sought to prevent secondary boycotts, not to hinder or prevent the ordinary primary strike which is specifically protected by Sections 7[5] and 13[6] of the Act. This is made clear by the legislative history of the Act and by numerous decisions of the Courts and the National Labor Relations Board. In discussing this section, Senator Taft, who was the author of the bill, stated:

> "This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between the employer and his employees . . .

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[4]So far as here relevant, Section 8(b)(4)(A) reads: "(b) It shall be an unfair labor practice for a labor organization or its agents . . . (4) to engage in, or induce or encourage the employees of any employer to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services, where an object thereof is: (A) forcing . . . any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person." 61 Stat. 140, 29 U.S.C. §158.

[5]Section 7. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." 61 Stat. 140, 29 U.S.C. §157.

[6]Sec. 13. "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 61 Stat. 151, 29 U.S.C. §163.

> All this provision of the bill does is to reverse the effect of [the Norris-LaGuardia Act] as to secondary boycotts." 93 Cong. Rec. 4198.

He further stated that "strikes for higher wages and hours and better working conditions . . . are entirely proper and . . . throughout this bill are recognized as completely proper strikes." 93 Cong. Rec. 3834.

The Board and the Courts early recognized this distinction. They further saw that much legitimate traditional primary activity might have some effect on third persons without violating the Act.

> "A strike, by its very nature, inconveniences those who customarily do business with the struck employer. Moreover, any accompanying picketing of the employer's premises is necessarily designed to induce and encourage third persons to cease doing business with the picketed employer. It does not follow, however, that such picketing is therefore proscribed by Section 8(b)(4)(A) of the Act. . . . *The section does not outlaw any of the primary means which unions traditionally use to press their demands on employers.*" (Emphasis supplied.)
>
> *Oil Workers International Union, Local 346 (Pure Oil Co.),* 84 N.L.R.B. 315, 318 (1949).

Also see: *N.L.R.B. v. International Rice Milling Co.,* 341 U.S. 665, 672-74, and footnotes 6-8 (1951); *NLRB v. Denver Bldg. & Construction Trades Council,* 341 U.S. 675, 687-88 (1951); *Rabouin d/b/a Conway's Express v. NLRB,* 195 F. 2d 906, 912 (2d Cir. 1952); *DiGiorgio Fruit Corp. v. NLRB,* 191 F. 2d 642,

649 (D.C. Cir. 1951), *cert. denied,* 342 U.S. 869 (1951); *United Electrical Radio and Machine Workers, Local 813 (Ryan Construction Corp.),* 85 NLRB 417 (1949); *General Teamsters, Local 249 (Crump, Inc.),* 112 NLRB 311 (1955); *Plumbers and Pipefitters, Local 106 (Columbia-Southern Chemical Corp.),* 110 NLRB 206 (1954).

This proposition is further admitted by the Board itself in the instant case (see R. 71, note 10), at least as to "premises occupied solely by the primary employer."

Such primary picketing may, of course, be directed at those places where primary employees of the primary employer work, whether or not they are directly involved in the dispute, in order to urge them to aid their co-workers. This would seem to be self-evident and no citations would be necessary if it were not for the fact that the trial examiner in the instant case seemed to suggest that picketing directed at employees of J. M. Long and Co. in the Crystal Palace Market, other than those employed at grocery stands, was to be considered in the same way as picketing directed at employees of secondary neutral employers (R. 40-41).[7] It is, of course, an absurdity to suggest that a primary employer can be neutral toward itself, and the majority of the Board seems to concede somewhat

[7]The concurring opinion of one Board member also seems to suggest something along the same lines. Although the concurring member first concedes "for the purposes of this opinion" that Long's non-grocery operations are "technically 'primary'" (R. 83, note 19), he then asserts that there was *no* primary picketing at all going on.

grudgingly that this position is untenable (R. 72). More recently, the Board has more forthrightly stated:

> "To the extent that picketing has as its object, and in fact induces employees of the struck employer to quit work and join their fellow workmen in concerted activity against their common employer, it is of course protected by Section 13 of the Act . . ."
>
> *Incorporated Oil Co.,* 116 NLRB No. 271 (Dec. 20, 1956) (39 L.R.R.M. 1106).

This is true even where in order to reach fellow employees of the primary employer who are not directly involved in the dispute it may be necessary to picket at the premises of a secondary employer which are not the main "situs" of the dispute. Thus in the recent *Otis Massey* case, *NLRB v. General Drivers, Warehousemen & Helpers, Local 968,* 225 F. 2d 205 (5th Cir., 1955) *cert. denied* 350 U.S. 914, where four truck drivers and warehousemen of a construction company were engaged in dispute with their employer, the Court held that in order to reach their fellow employees, the union representing the striking workers might place pickets at construction projects where the primary employer was acting as a subcontractor. Commenting on the Board's *Moore Dry Dock* criteria (*Sailors Union of the Pacific* [*Moore Dry Dock Co.*], 92 NLRB 547 [1950]), the Court in the *Otis Massey* case, *supra,* stated that:

> "No warrant exists either in the language of the statute or the authorities cited which would jutify the adoption and approval of its 'situs' theory to an extent inconsistent with other pro-

> visions of the Act [citing Section 13], or for empowering the Board, under the guise of fact-finding, to fix the 'situs' of a dispute at only one of a primary employer's numerous business activities, thereby isolating other employees of that same primary employer from exercising their statutory right under Section 7 to engage in mutual aid and protection and make common cause with their co-workers. See *Carter Carburetor Corp. v. NLRB,* 8th Cir., 140 F.2d 714, 718; *NLRB v. Peter C. K. Swiss Choc. Co.,* 2nd Cir., 130 F.2d 503, 506; *NLRB v. J. I. Case Co.,* 8th Cir., 198 F.2d 919, 922 . . .'' 225 F2d at 210.

A fortiori, there should be no doubt that striking employees may direct their picketing at fellow employees working at the same general location.

In this case, therefore, where picketing was directed at the employees of J. M. Long and Co., the primary employer, at the Crystal Palace Market, which is the property of the primary employer and the situs of the dispute, there should be no doubt that this was protected activity.

II.

THERE COULD BE NO SECONDARY BOYCOTT IN THIS CASE SINCE NO SECONDARY NEUTRAL EMPLOYERS WERE INVOLVED.

A. J. M. Long and Co. owns and is in managerial control of the whole Crystal Palace Market.

It is a simple matter of definition that there can be no secondary boycott in a case where no inde-

pendent secondary employer is in fact involved. As has been pointed out, J. M. Long and Co., the employer in this case, is the sole owner of the Crystal Palace Market (R. 170). Nor is this merely a question of "title to the property". J. M. Long and Co., in addition to operating a large number of stands and other facilities directly throughout the market, is also in managerial control over the market as a whole. While Mr. John Green is General Merchandise Manager of J. M. Long and Co. in charge of its retail operations, the company also has another officer, Mr. Sidney Haag, whose position is Vice-President of the corporation and General Manager of the Crystal Palace Market and whose duties concern "the general conduct of the market." It may be noted that Mr. Haag's offices are so located on the mezzanine floor of the market that he at all times has a view of the market as a whole through a glass enclosure (R. 211).

Those departments which are not operated directly by J. M. Long and Co. are "leased out" to so-called "tenants". The arrangement with these "tenants" is that they pay the J. M. Long and Co. a fixed monthly fee and in addition a percentage of their gross sales (R. 197). These departments may be entered by J. M. Long and Co. to see that they are "being properly conducted", and that they are "being conducted in an orderly and clean fashion". J. M. Long and Co. also may audit the books and bank statements of their "tenants" (R. 198). Under Mr. Haag's supervision there is an advertising manager

who handles all advertising for the market as a whole including its tenants (R. 197). In addition to its offices, directly operated stands and warehouses, Long also maintains a carpenter shop in which it builds and repairs fixtures for itself and its "tenants" (R. 241).

It is denied that J. M. Long and Co. has any control over the labor relations of their "tenants". Yet Mr. Haag openly admitted that he told grocery stand operators before the start of the picketing "that *under no consideration* would I *permit* them to open their places on Monday morning, in order to effect a safeguard against picketing", and that those supposedly independent neutral "tenants" replied "that my *demands* were clear enough and that they would not open" (R. 186).[8] What more direct and strong control can there be over labor relations than the power to order a stand operator to lock out his employees and not to open his stand?

If such an arrangement as the facts of this case show can insulate an employer under the law against effective primary picketing, all large retail and department stores could easily manage to "lease out" a few departments in this manner. If the Board's theory in this case is accepted, such business would still receive their profits and remain in control, but no union would be permitted to picket on the public

[8]It is to be noted that those remarks of Mr. Haag were made freely under direct examination. Under cross-examination he repeated, "I would not permit them to open, hoping to forestall a picket line. . . ." (R. 202.)

sidewalk adjacent to their premises, a "means which unions traditionally use to press their demands on employers" in the retail field. (*Pure Oil Co., supra*). This, then, is the real effect of the Board's decision in this case.

B. The operators of the various departments in the Crystal Palace Market cannot be considered disinterested neutral employers.

When Section 8(b)(4)(A) was being debated in the Congress, Senator Taft, the author of the bill, stated that,

> "This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between the employer and the employee." 93 Cong. Rec. 4198.

As has been pointed out, the Courts and the Board have agreed that this section is not a restraint against primary action but is intended only to restrict secondary action against neutral employers with whom the primary employer is doing business.

It is not, of course, contended that any person with whom a primary employer is engaged in a regular course of dealings should be considered to be a non-neutral. Nor is this such a case as *NLRB v. Denver Building & Construction Trades Council,* 341 U.S. 675 (1951), where the Court found that the well established legal relationships between a contractor and a subcontractor are such that they must be held to be independent employers doing business with each

other. Nor, in fact, as has been demonstrated, is this a normal tenant-landlord relationship which might well be considered to be independent for many purposes.

Here the primary employer has almost complete managerial supervision and control and a direct financial interest in the operations of the allegedly "secondary employers".

That non-neutral, allied employers were not protected by Section 8(b)(4)(A) has been recognized generally by the Board, the courts and legal scholars. See e.g. *National Union of Marine Cooks and Stewards (Irwin-Lyons Lumber Co.),* 87 NLRB 54 (1949); *Douds v. Metropolitan Federation of Architects* (*Ebasco* case); 75 F. Supp. 672 (S.D.N.Y. 1948); *NLRB v. Business Machine Union, Local 459 (Royal Typewriter* case), 228 F.2d 553 (2d Cir., 1955), cert. denied 351 U.S. 962; *Tower, A Perspective on Secondary Boycotts,* 2 Lab. L. J. 727, 737-38 (1951); *Sherman, Primary Strikes and Secondary Boycotts,* 5 Lab. L.J. 241, 244-46 (1954); *Note,* 40 Minn. L. Rev. 872 (1956).

In the *Irwin-Lyons Lumber Co.* case, supra, the Board held that where a claimed "secondary" employer was substantially owned and under the managerial control of the primary employer and both were engaged in a common business enterprise, they were allied anl there could be no violation of 8(b)(4)(A). In the much cited *Ebasco* case, supra, Judge Rifkind found that separate corporate ownership is

not conclusive evidence of neutrality. There the primary employer involved in a dispute with a union had "farmed out" his work to a subcontractor who, as the court found, was therefore not an innocent bystander to the dispute but an ally of the primary employer. This holding was approved by Senator Taft, who stated,

> "The spirit of the Act is not intended to protect a man who . . . is cooperating with the primary employer and taking his work and doing the work which he is unable to do because of the strike." 95 Cong. Rec. 8709.

Nor is the fact controlling that in the *Ebasco* case there was a prior contractual agreement between the employers. In the *Royal Typewriter* case, supra, the Second Circuit held that otherwise independent typewriter repairmen became allies and were not protected against picketing where they made repairs on typewriters which, except for the strike, would have been made under a warranty by the struck typewriter company.

That J. M. Long and Co. was in complete ownership of the Crystal Palace Market, had a direct financial interest in the operations of all departments, and had substantially complete managerial control over them has already been demonstrated. There is also a great resemblance here to the "farming out" type of case, at least as to some of the stands. It appears that three of the grocery stands in the Market had signed the agreement with the union and were

to remain open (R. 411).[9] Other grocery stands reopened after the picketing started (R. 198-199). It is self-evident that if picketing could have been strictly confined to the grocery stand operated directly by Long, such other freely operating grocery stands in the market would of necessity have picked up much of the trade of those customers who normally purchased at Long's closed stand. Moreover, because of the percentage of profits arrangement, J. M. Long and Co. would actually have obtained a financial benefit from sales which such other stands made to these customers.

Moreover, as Member Murdock pointed out in his dissent in the recent *National Cement Products Co.* case, 115 NLRB 1290, 1295 (1956), there is nothing in the cases so far discussed "which even suggest that in no other situation can a finding be made that the secondary employer is not a neutral or 'wholly unconcerned' employer." This has also been the position of the Board's General Counsel:

> "Even where no transfer of 'struck work' is involved, the General Counsel has indicated that he will apply Judge Rifkind's 'ally' concept to subcontractors in certain industries, particularly the ladies' garment industry, because of the high degree of integration between the operations of the subcontractor and the manufacturer or jobber." *Sherman, supra,* 5 Lab. L. J. at 246.[10]

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[9]Mr. Haag testified, "Obviously, if they signed, they could remain open . . ." (R. 202.)

[10]Citing mimeograph release of NLRB, "Statement of George J. Bott, General Counsel, National Labor Relations Board, Before the Committee on Labor and Public Welfare of the United States Senate, April 28, 1953", pp. 27-29.

III.

EVEN IF THE OTHER OPERATORS ARE TO BE CONSIDERED NEUTRAL SECONDARY EMPLOYERS, THERE CAN BE NO VIOLATION OF SECTION 8(b)(4)(A), SINCE IT WAS NOT AN OBJECT OF THE PICKETING TO PREVENT THEM FROM DOING BUSINESS WITH J. M. LONG AND CO.

The main basis for the decisions in the cases cited *supra,* which have held that "allied" employers are not protected by Section 8(b)(4)(A) is that such allied employers are not "doing business" with the primary employer in the sense the statute uses that term. See, *Tower, A Perspective on Secondary Boycotts,* 2 Lab. L. J. 727, 737-38 (1951).

As Judge Learned Hand has clearly stated it:

> "The gravamen of a secondary boycott is that its sanctions bear not upon the employer who alone is a party to the dispute, but upon some third party who has *no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands." International Brotherhood of Electrical Workers, Local 501 v. NLRB,* 181 F.2d 34 (2d Cir., 1950), *affirmed* 341 U.S. 694 (1951). (Emphasis supplied.)

It follows, of necessity, that "if the primary and secondary employers are not doing business with each other, then inducement of the employees of the secondary employer is not unlawful under this particular section of the Act." *Tower, Secondary Boycotts: An Outline,* 5 Lab. L. J. 183, 187 (1954).

Respondent Board claims that the relationship between J. M. Long and Co. and the operators of the

various departments is a normal landlord-tenant relationship. If this claim is taken at face value, we do not believe that it can therefore seriously be maintained that such a relationship is what Congress had in mind by the term "doing business". The only way that these parties could "cease doing business" is if the lessees were to terminate their lease and move out. There is no evidence, nor could there be, that such a result was "an object" of petitioners' picketing[11] or that such an idea ever entered the minds of either petitioners or any of the lessees.

Nothing in the case of *United Marine Division, Local 333, I.L.A. (New York Shipping Association),* 107 NLRB 686 (1954), mentioned during the hearing before the Trial Examiner in this case by counsel for the General Counsel to the Board can be interpreted as refuting what has been argued above. While that case contains some loose language on this subject[12] the employers there involved, tugboat companies and steamship companies, did normally do business with each other. The only reason that they were not "doing business" with each other at the time of the picketing under dispute was because the tugboat companies, the primary employers, had shut down as a result of the labor dispute with union.

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[11]Even if a cessation of business is a *result* of a union's activities, this is not a violation of the Act unless such cessation of business was "an object" of the union's actions. See the detailed discussion of this point in Judge Learned Hand's opinion in *Douds v. International Longshoremen's Assn.*, 224 F.2d 455 (2d Cir., 1954), cert. denied 350 U.S. 873.

[12]For a criticism of that case, see *Marksen, "To Cease Doing Business"—What Does It Mean?,* 6 Lab. L. J. 222 (1955).

Nor is this case in any way like *NLRB v. Denver Construction Trades Council,* 341 U.S. 675 (1951), and similar cases where the courts have found that it was a specific object of the union's picketing to induce contractors to cease doing business with a non-union subcontractor.

IV.

IF THE OTHER OPERATORS ARE CONSIDERED TO BE SECONDARY NEUTRAL EMPLOYERS, THE UNION NEVERTHELESS HAD A RIGHT UNDER THE LAW TO PICKET THE PRIMARY EMPLOYER AT THE PRIMARY SITUS OF THE DISPUTE.

As has been demonstrated, *supra,* the legislative history of the Act and the uniform course of decisions of the courts and the Board agree that the law does not prohibit traditional primary picketing activity directed against a primary employer. It is also universally conceded that this is true even, as is nearly always the case, there is some incidental effect on disinterested third parties.

Thus in the leading and widely cited *Pure Oil Company case* (*Oil Workers Union, Local 346*), *supra,* which the Board's opinion in the instant case strangely fails to mention, the Board said:

> "A strike by its very nature inconveniences those who customarily do business with the struck employer. Moreover, any accompanying picketing of the employer's premises is necessarily designed to induce and encourage third persons to cease doing business with the picketed employer.

> It does not follow, however, that such picketing is therefore proscribed by Section 8(b)(4)(A) . . . In this case the Union was making certain lawful demands on Standard Oil. It was pressing those demands, in part, by picketing the Standard Oil dock. *As that picketing was confined to the immediate vicinity of Standard Oil premises we find that it constitutes permissive primary action.* . . . The fact that the Union's primary pressure on Standard Oil may have also had a secondary effect, namely inducing and encouraging employees of other employers to cease doing business on Standard Oil premises, does not, in our opinion, convert lawful primary action into unlawful secondary action within the meaning of Section 8(b)(4)(A)." 84 NLRB at 318-320. (Emphasis supplied.)

It is to be especially noted that the above quoted passages from the *Pure Oil* case appear on those pages which were specifically cited with approval by the Supreme Court in its decision in *NLRB v. International Rice Milling Co.,* 341 U.S. 665, 672-673, note 6 (1951). It is further to be noted that the *Pure Oil* case is one of the so-called "common situs" cases. The charging party, the Pure Oil Co., was a neutral secondary employer which was doing business on the premises of the primary employer, the Standard Oil Co., and whose business was in part disrupted by the union's picketing.

Similar in every way is the Board's famous *Ryan Construction Corp.* case, 85 NLRB 417 (1949). There the union was in dispute with the primary employer,

Bucyrus, and picketed all entrances to the plant, including one that had been especially constructed for employees of Ryan who were engaged in a construction project which Ryan was performing for Bucyrus. There the Board stated, again on the specific page cited with approval in the *Rice Milling* case, *supra:*

> "Concededly, an object of the picketing was to enlist the aid of Ryan employees, as well as that of employees of all other Bucyrus customers and suppliers. However, Section 8(b)(4)(A) was not intended by Congress . . . to curb primary picketing. It was intended to outlaw certain *secondary* boycotts, whereby unions sought to enlarge the economic battleground *beyond the premises of the primary employer. When picketing is wholly at the premises of the employer with whom the union is engaged in a labor dispute, it cannot be called 'secondary'* even though, as is virtually always the case, an object of the picketing is to dissuade all persons from entering such premises for business reasons." 85 NLRB at 418. (Emphasis supplied.)

As recently as April, 1955, the Board again held, in an almost identical situation, that it was proper to picket all entrances to the premises of the primary employer, including one used exclusively by employees of a construction company working on the premises, as long as the signs and conduct of the pickets indicated that the dispute was with the primary employer. *General Teamsters Local Union 249 (Crump, Inc.),* 112 NLRB 311 (1955). Also see *NLRB v. Service Trade Chauffeurs, Local 145,* 191 F.2d 65, 67 (2d Cir. 1951).

In a case decided since the instant case the majority of the Board has cited the instant case for the proposition that "title to property" cannot be the determinative factor in assessing the legality of picketing activity. *Local 618, Automotive Employees Union (Incorporated Oil Co.),* 116 NLRB No. 271 (Dec. 20, 1956) (39 L.R.R.M. 1106). That, of course, is in no way the issue here. The Crystal Palace Market was the specific primary situs of the dispute; J. M. Long and Co. maintained direct operations throughout the premises and had its headquarters there. If J. M. Long and Co. could not be picketed at the public entrances of the Crystal Palace Market, no picketing could be carried on against it anywhere.

The attempt of the majority of the Board to reverse its consistent previous holdings and to prohibit peaceful primary picketing at the premises of the primary employer is beyond its authority under the law and should be rejected by this Court. As Member Murdock stated in his strong dissent in the *Incorporated Oil Co.* case, *supra,* between the majority decisions in that case and the instant case, "the state of the Board law with respect to secondary boycotts in important areas is well obfuscated." Clarification and protection of rights guaranteed by the Act can be obtained only by returning to the consistent previous positions of the Courts and the Board as outlined in the above discussion.

A. The Board's "Moore Dry Dock rules" established for common situs cases are not applicable in this case.

In addition to recognizing the right of workers to picket at the main premises of the employer, the Board and the courts have recognized the fact that in order to carry on an effective strike it sometimes becomes necessary to place pickets at premises of a secondary employer where fellow employees of the primary employer may be working. This is especially true in the construction industry where subcontractors are temporarily employed at a construction site, and in cases involving trucks and other so-called "moveable situses".

In such cases it, of course, often becomes difficult to balance the right of employees to engage in a primary strike and the right of neutral secondary employers to be protected from secondary boycotts. In order to balance these conflicting interests the Board attempted in *Sailors Union of the Pacific (Moore Dry Dock Co.),* 92 NLRB 547, 549 (1950), to set up a series of standards that must be met. In that case the Sailors Union was engaged in a strike against a ship which was being repaired at a drydock owned by the Moore Drydock Co. The Board held that picketing by the union outside the dry dock did not constitute a secondary boycott. In setting up its standards the Board clearly indicated that they were to apply where picketing occurred at the *secondary* employer's premises:

> ". . . we believe that picketing *the premises of a secondary employer* is primary if it meets the following conditions: (a) The picketing is strictly

limited to the times when the *situs* of the dispute is located *on the secondary employer's premises;* (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the situs; and (d) the picketing discloses clearly that the dispute is with the primary employer." (Emphasis supplied.)

These standards won quick approval and have been applied in a number of similar cases. See *e.g. NLRB v. Service Trade Chauffeurs, Local 145, supra; International Brotherhood of Boilermakers (Richfield Oil Corp.),* 95 NLRB 1191 (1951). These rules, adopted for the liberal purpose of making clear that picketing may properly be conducted at the premises of a secondary employer, were not intended nor should they be used to hinder peaceful picketing at property wholly owned and controlled by a primary employer which is also the primary situs of the dispute as has been done in this case.

The only cases where picketing at the primary situs has been held to be a violation of Section 8(b)(4)(A) is where the pickets, either by their signs or by their behavior on the picket line, gave the impression that the strike was directed against a secondary neutral employer who was also located there. *NLRB v. Chauffeurs, Teamsters, Local 135,* 212 F.2d 216 (7th Cir., 1954); *NLRB v. Local 55, Carpenters and Joiners,* 218 F.2d 226 (10th Cir., 1954); *Piezonki d/b/a Stover Steel Service v. NLRB,* 219 F.2d 879 (4th Cir., 1955); *General Teamsters, Local 249 (Crump, Inc.), supra.*

There can be no claim that this was the case here. The picket signs clearly and specifically named J. M. Long and Co. as the employer against whom the strike was directed (Respondents' Exhibits 1-8; R. 192-193). In the words of the Trial Examiner, "the signs were carefully tailored to the dispute." (R. 44.) The purpose of the picketing was clearly to appeal to the public not to shop with J. M. Long and Co. The pickets were instructed not to bother employees of other employers and there is no evidence that they did so. Moreover, a number of other employees did consistently cross the picket line without any incidents (R. 394-395).

B. Even if the Board's common situs rules are applied, all requirements were here met.

There is no claim, nor can there be, that the first, second and fourth conditions of the Moore Dry Dock test were not met in this case. The only argument that is advanced under these rules is that the picketing here was not confined "to places reasonably close to the location of the situs" of the dispute. But, of course, as has been demonstrated, the strike here was directed against J. M. Long and Co. and so the Crystal Palace Market, owned and operated by J. M. Long and Co., *was* the situs and the *only* situs of the dispute.

Even if we accept the argument that only those facilities in the market which were *directly* operated by J. M. Long and Co. are to be considered the situs of the dispute, the picketing of each entrance

to the market was reasonable and justified. As the diagram of the market (General Counsel's Exhibit No. 19) clearly demonstrates, each and every entrance was near to one of Long's operations. One entrance on Market Street opened directly into Long's appliance department, two others on Market Street were within a few feet of one of Long's magazine, tobacco and liquor departments. The entrance on Stevenson Street was to Long's offices and its carpenter shop, and close to Long's grocery department; that on Jessie Street directly adjoins the other end of the grocery department. In addition there are entrances to Long's free parking lot, and two other entrances on Eighth Street, one of which leads directly to Long's other tobacco and liquor department and the other of which immediately adjoins Standard Groceteria, against which primary picketing was also directed. Moreover, the evidence is clear that the customers and employees of J. M. Long and Co. customarily use *all* the entrances to the market (R. 176-177).

It is indeed puzzling from what source the Board here finds a requirement that picketing must be carried on inside the market. For purposes of advising the general public of a dispute, picketing always takes place on the public sidewalks. Stepping inside the doorways, of course, would have hindered the object of reaching the general public, and it is not at all clear how employees of the so-called "secondary employer" would have been less interfered with by pickets parading inside the doorways on Market, Jessie or Eighth Streets. The diagram of the market also

clearly indicates what utter confusion would have resulted from pickets trying to parade around each of the various operations of J. M. Long and Co. Undoubtedly *more* pickets would have been needed, and having pickets parade up and down the narrow aisle ways would have completely disrupted all activities inside. Moreover, the apparent purpose of insulating and protecting other operators would not have been served, since it would have been impossible for anyone to know whether a picket was directed against a department operated by Long or against any other department a few steps across the aisle from it. It is further to be noted that not only those departments operated directly by J. M. Long and Co. could have been picketed, but that the union would have had every right to surround with pickets all the other grocery departments which had not signed the agreement and had locked out their employees.

The only possible source of the Board's novel requirement announced in this case that picketing be carried on inside struck premises is the fact that in the *Moore Dry Dock* decision, *supra,* the union had been refused permission to picket directly around the ship of their primary employer inside the dry dock. But, as noted, that was a case where the dry dock itself was owned and operated by an entirely neutral secondary employer and the only dispute was with the owner of the ship.

In another closely related case the courts have strongly criticized and refused to follow the recent trend of the Board to apply its *Moore Dry Dock*

formula in a strictly mechanical manner without looking at the actual circumstances of the case or at the true objectives of the picketing:

> "No warrant exists either in the language of the statute or the authorities cited which would justify the adoption and approval of its 'situs' theory to an extent inconsistent with other provisions of the Act [citing Section 13] . . ." *NLRB v. General Drivers, Warehousemen and Helpers, Local 968, supra,* at 210.

See also *Sales Drivers and Helpers, Local 859 v. NLRB,* 229 F.2d 514 (D. C. Cir., 1955), *cert. denied* 351 U.S. 972; *Alpert v. United Steel Workers,* 141 F. Supp. 447 (1956); *LeBus v. Local 406, Int'l Union of Operating Engineers,* 145 F. Supp. 316, 321 (1956); and see *Souders, Secondary Boycotts and the Taft-Hartley Act,* 4 St. Louis Univ. L. J. 190 (1956).

In the instant case the facts clearly demonstrate that the Board has not only failed to apply long and firmly established principles guaranteeing the right to engage in peaceful primary picketing, but that in its use of the *Moore Dry Dock* rules here, it has attempted to mechanically apply a rigid and wholly unrealistic and impractical *ad hoc* requirement in total disregard of the actual circumstances of the case.

CONCLUSION.

The facts of this case show that petitioner Local 648 was engaged in a primary labor dispute against J. M. Long and Co. at the company's premises in the Crystal Palace Market. In furtherance of this dispute the unions engaged in peaceful picketing on the public sidewalks immediately adjacent to the employer's premises which was the primary situs of the dispute. The legislative history of the National Labor Relations Act and a long line of decisions of the courts and the Board have consistently held that such primary picketing is protected by the Act.

J. M. Long and Co. owns and operates the whole Crystal Palace Market and maintains almost complete managerial control of the whole market, including those departments which it does not operate directly. Even if the operators of the various departments may be considered separate employers for certain purposes, they were so closely allied with J. M. Long and Co. that they cannot be considered to be unconcerned neutral secondary employers within the meaning of the Act and the decisions.

In order for there to be a violation of Section 8(b)(4)(A) of the Act an object of the picketing must be to induce a secondary employer to cease doing business with the primary employer. The record of this case fails to establish either that there were any secondary employers here involved within the meaning of the Act or that an object of the picketing was to induce any secondary employer to cease doing business with J. M. Long and Co.

There is no legal or logical support for the proposition that the petitioning union was required by law to carry on its picketing inside the Crystal Palace Market. The whole Crystal Palace Market was the primary situs of the dispute. All picketed entrances immediately adjoined premises under the direct operation of J. M. Long and Co. The physical set-up of the market would have made effective picketing inside impossible and an absurdity. Further, it is not disputed that the pickets through their signs and their actions made it perfectly clear that the picketing was directed against J. M. Long and Co., the primary employer.

The attempt of the Board to restrict and prohibit peaceful primary picketing directed against a primary employer at his own premises flies in the face of the purposes, policies and protections of the Act and is in conflict with established legal precedents.

For the reasons set forth, petitioners respectfully pray this Court to set aside, vacate and annul the order of the Board and grant such other and further relief as it may deem just and proper.

Dated, San Francisco, California,
February 25, 1957.

CARROLL, DAVIS & BURDICK,
By ROLAND C. DAVIS,
Attorneys for Petitioners.

No. 15298

In the United States Court of Appeals for the Ninth Circuit

RETAIL FRUIT & VEGETABLE CLERKS UNION, LOCAL 1017 AND RETAIL GROCERY CLERKS UNION, LOCAL 648, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AND SET ASIDE AND ON REQUEST FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon the petition of two labor organizations—Retail Fruit & Vegetable Clerks Union, Local 1017, and Retail Grocery Clerks Union, Local 648, both affiliated with the Retail Clerks International Association, AFL-CIO, (herein called Local 1017 and Local 648, respectively)—to review and set aside an order of the National Labor Relations Board issued against them. The Board, in its answer to the petition, has requested enforcement of its order.

The Board's order was issued on August 24, 1956, following proceedings under Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Sec. 151, *et seq.*), herein called the Act.[1] This Court has jurisdiction of the proceeding pursuant to Sections 10(e) and (f) of the Act, the unfair labor practices having occurred in the City of San Francisco, California, within this judicial circuit. The Board's decision and order (R. 63-78) [2] are reported at 116 NLRB No. 99.

STATEMENT OF THE CASE

In furtherance of a labor dispute over contract terms between the Retail Grocers Association, an employer organization of grocers doing business in San Francisco, California, and Local 648, the union representing their employees, petitioners engaged in picketing and allied activity at the Crystal Palace Market in San Francisco, where some members of the Grocers Association do business along with a large number of other employers. The Board found that this action violated the secondary boycott provision of the Act, Section 8(b)(4)(A), in that it was directed against employees of operators in the Crystal Palace who were not involved in the contract dispute. The underlying facts upon which the Board predicated its conclusion may be summarized as follows:

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[1] The relevant portions of the Act are set forth in Appendix A, *infra*, pp. 35-37.

[2] References to portions of the printed record are designated "R." Whenever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

I. The Board's Findings of Fact

A. The events leading to the picketing

The Grocers Association and Local 648 have, since 1937, engaged in collective bargaining and the negotiation of collective agreements covering employees of several hundred retail grocery stores in San Francisco (R. 14, 15, 22; 4, 123-124, 127). In the fall of 1954, the parties entered into discussions respecting a new contract to replace their existing agreement, which was to expire on January 1, 1955 (R. 22; 129-130, 138, 140). A series of twelve meetings was held without an agreement being reached, and negotiations were broken off on January 25, 1955 (R. 22; 145-146). Thereafter, on February 3, Local 648 established picket lines at two grocery stores operated by members of the Grocers Association who are not involved in the present case (R. 24; 148, 361-362). The Grocers Association responded the same day by instructing all of its members to lay off their employees, pursuant to a policy of treating a strike against any one of its members as a strike against all (R. 148-149).

Among the members of the Grocers Association were operators of grocery and delicatessen concessions in the Crystal Palace Market, including J. M. Long & Company and Standard Groceteria. The Crystal Palace is a large retail market in downtown San Fransisco owned by Long, in which Long leases space to approximately 64 separate retail food businesses and service establishments, and in addition carries on several retail enterprises of its own (R. 17; 167-169). The leased shops within the Crystal Palace Market are independently operated, and include such businesses as delica-

tessens, creameries, bakeries, fruit and vegetable stands, meat markets, restaurants, and shoe repair concessions (R. 17; 167-169, 196-198). They occupy counters along the market's interior walls, or self-enclosed stands along aisleways, much like the floor arrangement found in large department stores (R. 19; Appendix B, *infra,* p. 38).[3]

Pursuant to the Grocers Association's instructions, Long's grocery department and Standard Groceteria closed down operations entirely on the evening of February 3. They closed off their areas within the Crystal Palace Market with drawn curtains, and did not reopen during the events hereafter described (R. 24; 182-184, 195-196, 212-214). However, of the several other retail food concessions in the Crystal Palace Market which hired employees within the jurisdiction of Local 648 and which were represented by the Grocers Association in contract negotiations (R. 22; 386-387, 396), not more than one or two laid off their employees at this time (R. 22, 24-26; 151-153, 161-162, 184, 356-357, 393-394). The remaining retail operations housed in the Crystal Palace Market, constituting the large majority of the shops, were not represented by the Grocers Association and were not involved in the contract dispute, and they too remained open for business (R. 64-65; 183-184). Included in this group were liquor, tobacco, and appliance departments operated

[3] For the convenience of the Court we reprint in Appendix B, hereto (*infra,* p. 38), General Counsel exhibit No. 19, which consists of a diagram of the premises occupied by Crystal Palace Market, and of the position of the shops inside the market. Upon petitioners' request, this exhibit has been certified to the Court in original form in lieu of being printed in the record, pursuant to Rule 34(9) of the Court (R. 112-113).

directly by Long, and staffed by employees who are not represented by Local 648 (R. 18, 24; 167-168).[4]

In the days that followed February 3, Local 648 extended its picketing activities to other San Fransisco grocery stores whose employees it represented, and by direct negotiations succeeded in obtaining signatures of a large number of store operators to the contract it had proposed to the Grocers Association (R. 24, 27; 362, 406). On February 12, a business representative of Local 648 visited six of the retail food shops in the Crystal Palace Market other than Long and Standard, for the purpose of obtaining their agreement to the union's proposed contract (R. 25; 357-358, 410-412). The union agent talked with the shop operators both individually and in a group, with the result that three of the operators signed the contract and three did not (*ibid.*). All six met later in the day with Sidney Haag, general manager of Long, and informed him that Local 648 had insisted that those who had not signed must do so the next day (R. 26; 184-186, 215-216). Haag replied that each tenant would have to decide for himself whether to sign the proposed contract, but that in order to avoid picketing at the Crystal Palace Market he would not permit any shop that had not signed with the union to be open for business on the day following the deadline set by Local 648 (*ibid.*). The same evening two of the three operators who had not agreed to the union's contract laid off their employees, and the third transferred his employee to an operation not within Local 648's jurisdiction (R. 26; 186, 198-199, 415-416).

[4] This group also included five retail fruit and vegetable shops, which were members of the Retail Fruit Dealers Association, and whose employees were represented by petitioner Local 1017 (see p. 8, *infra*).

On February 14 several officials of Local 648, together with representatives of other unions, met with Haag and John Green, who was in charge of Long's retail operations, in an effort to persuade Long to adopt the union's proposed contract (R. 27, 65; 187-188, 217-219, 358-360). Haag and Green refused, electing to stand by the position taken by the Grocers Association (*ibid.*). Haag then told Local 648 officials that there was no need to picket the Crystal Palace Market in view of the fact that the employers involved in the dispute who were located there had closed down their operations (R. 27; 188, 218). Haag added, however, that if the union insisted on picketing, it would have his "full permission . . . to bring . . . pickets inside the market and picket each of the individual stands" (*ibid.*). Local 648's business representative and spokesman at the meeting, Claude Jinkerson, replied that inside picketing "wouldn't give him the economic force that he needed," and rejected the offer (R. 28; 188-189, 218-219). Haag then requested that 24 hours notice be given of any picketing, but Jinkerson refused to make such a committment and the meeting ended (R. 28; 189).

B. The picketing activity at the Crystal Palace Market

At 6:30 the following morning, February 15, Local 648's pickets appeared outside the Crystal Palace Market (R. 28; 189-190, 271-272, 363, 395). The picketing was conducted at seven of the eleven public entrances to the market, the remaining four being located in the rear of the market facing the parking area owned by Long (R. 29; 190-191, G.C. Exhibit 19 *infra,* p. 38). As shown in General Counsel's Exhibit No. 19 (*infra,* p.

38), the picketed entranceways included the two on either side of Long's grocery department (Nos. 1 and 2 on Exhibit 19); the three main entrances on Market Street, one affording direct access to Long's Appliance Store (No. 5), another leading into the aisle along the side of which were Long's tobacco and liquor shops (No. 4), and the third entering upon an aisleway to which none of Long's counters was contiguous (No. 3); and two entrances on Eighth Street, one being next to Standard Groceteria (No. 6), and the other leading directly to other liquor and tobacco shops operated by Long (No. 7).

The pickets carried signs which alternatively referred to Standard Grocery and J. M. Long Co. as unfair, and bore the identification: "Grocery Clerks Union A.F.L., Sponsored by S.F. Labor Council" (R. 30; 192, 364-365, Respondent's Exhibits 1-8).[5] The picketing was peaceful, and lasted from February 15 to February 24.[6] The Crystal Palace Market remained open to the public during the picketing, and the majority of the shops stayed open for business (R. 49-50; 195, 199, 226, 277-278, 308). In instances where the employees of neutral shop owners refused to cross the picket line (*infra,* pp. 8-10), the owners frequently tended the businesses by themselves (R. 50, 52; 199, 226, 279, 308).

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[5] Respondent's Exhibits 1-8 consist of photographs of the picketing activity, and have been certified to the Court as original exhibits in lieu of printing (R. 113).

[6] The record does not reveal the reason for termination of the picketing. On March 18, 1955, however, a new contract was finally agreed upon and executed by the Grocers Association and Local 648 (R. 24; 151).

C. Local 1017's participation in picketing.

Local 1017, affiliated with the same International organization as Local 648 (Retail Clerks International Association, AFL-CIO), represents employees of retail fruit and vegetable businesses in San Fransisco, including five such shops located in the Crystal Palace Market (R. 22-23, 45; 5, 244, 417). At the time of the picketing at Crystal Palace Market, Local 1017 was party to a collective bargaining agreement, due to expire on April 1, 1955, with the Retail Fruit Dealers Association of San Francisco, a trade organization representing, *inter alia,* the five fruit and vegetable stands in the Crystal Palace Market (R. 22-23, 45; 5, 244, 246-248). Although the existing contract between these parties contained a no-strike clause (R. 23; 248, 253), Local 1017 participated in the activity of Local 648 and acted to prevent any of its members from working during the picketing.

Thus, as soon as negotiations between Local 648 and the Grocers Association had reached an impasse, officials of Local 1017 told various of the employers for whom its members worked, as well as the employer association to which such employers belonged, that their employees would not cross picket lines established by Local 648 (R. 46, 49, 51-52; 224-225, 253, 269-271, 317). Similarly, when the prospect of picketing at the Crystal Palace Market was imminent, the same officials warned the operators of the fruit and vegetable stands to "buy light," since Local 1017 members "would not be able to cross the picket line" (R. 224, 317). Allen Brodke, Local 1017's Secretary-Treasurer, also accompanied Local 648's officials to the February 14 meeting with Haag and Green (*supra,* p. 6), at which time

Local 648 attempted to obtain Long's agreement to the union's proposed contract (R. 46; 187, 217). The following morning Brodke was present at the Crystal Palace Market when the picketing began, and he walked with the pickets for a short time. He returned on each succeeding day that the picket line was in effect, although his normal duties did not involve visits to the Market (R. 46; 232, 435-436). When he saw members of Local 1017 near the picket line on the occasions he was present, Brodke would comment to them, "pretty good picket line around here" (R. 47; 435). Except in a few isolated cases, Local 1017 members did not cross the picket line, and their employers were compelled either to shut down or to carry on by themselves (R. 226-228, 273, 296, 309).

Local 1017 also aided Local 648 in its disputes with the Grocers Association by assigning one of its business agents, Pat Savin, to assist Local 648 (R. 47; 402-403, 422-423, 440, 442-443). While on this assignment Savin frequently appeared at the Crystal Palace Market and, when spoken to there by Local 1017 members, made clear to them that its was not Local 1017's policy to cross the picket line (R. 48; 305-306, 423-424, 428-429). Indeed, on February 15, the day on which the picketing of the Crystal Palace Market began, Savin walked through the Market and, seeing a member of Local 1017 at work trimming vegetables, instructed him to "drop that knife and get out" (R. 50; 305). The same day Savin also approached another Local 1017 member inside the market, and stated "you are not supposed to be here; come on, let's go" (R. 50; 306). Both employees left the building upon being spoken to by Savin (R. 50; 305-306). The effectiveness of Local 1017's

control over employment at the fruit and vegetable stands during the picketing was further demonstrated several days thereafter, when one of the shops in Crystal Palace Market needed emergency help to prevent spoilage of goods. The operator of the shop approached Local 1017 directly which, only because of these special circumstances, granted permission to employ one of its members (R. 74; 308, 427).

Local 1017's members, as well as those of Local 648, returned to work on February 24, when the picketing was terminated (see n. 6, *supra;* R. 195).

II. The Board's Conclusions and Order

Upon the foregoing facts, the Board, one member concurring in a separate opinion and two members dissenting, concluded that both Locals 648 and 1017 had violated Section 8(b)(4)(A) of the Act. The Board applied its traditional standard for determining the legality of picketing which occurs at premises which are occupied jointly by primary and secondary employers, i.e., whether the picketing union has taken all practical steps to confine its picketing to the primary employer and to minimize its effect on neutral employers (R. 68-69). It concluded that Local 648 failed to satisfy this standard by: (1) rejecting Haag's offer to place pickets inside the Crystal Palace Market at the particular shops against which the picketing was directed; (2) picketing an outside entranceway to the Market (designated No. 3 on G.C. Exhibit 19) which did not lead directly to any of the primary employers' places of business (R. 72-73); and (3) business agent Savin's direct inducement of two members of Local 1017 to cease working during the picketing (R. 74). The Board further found that, by supporting Local

648's picketing activities, Local 1017 was also chargeable with this illegal conduct, and thus it too violated Section 8(b)(4)(A) (R. 75).

In reaching the forgoing conclusions, the Board rejected the contention advanced by Locals 648 and 1017 that the tenants of Crystal Palace Market whose employees were induced to cease work were not neutrals in the labor dispute, but actually were allies of Long, subject to his control, and therefore not within the protection which Section 8(b)(4)(A) affords neutral employers (R. 66-67.

To remedy the foregoing violations, the Board's order requires Locals 648 and 1017 to cease and desist from inducing the employees of Crystal Palace Market's tenants or of other employers to refuse to perform services where an object thereof is to require their employer to cease doing business with Long, in his capacity as owner of the Crystal Palace Market, or with any other employer. Affirmatively, the Board's order requires Locals 648 and 1017 to post appropriate notices (R. 76-78).

SUMMARY OF ARGUMENT

I

A. The picketing in this case occurred at premises occupied jointly, for full time business purposes, by employers who were directly involved in the contract dispute between Local 648 and the Grocers Association and employers who did not hire members of Local 648 and were completely neutral in the dispute. In such "common situs" situations the allowable scope of picketing under Section 8(b)(4)(A) of the Act, the secondary boycott provision, must be determined in the

light of "the dual congressional objectives of preserving the right of labor organizations to bring pressure on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *N.L.R.B.* v. *Denver Bldg. & Constr. Trades Council,* 341 U.S. 675, 692. As the cases hold, a proper accommodation of these objectives is achieved by requiring a union in such circumstances to so conduct its picketing "as to minimize its impact on neutral employees" insofar as practical (R. 69). Contrary to petitioners' contention, the fact that the premises picketed in this case were owned by one of the primary employers in the labor dispute (Long), and were used by him to carry on several retail concessions, does not justify treating the picketing as though it were at premises where only the primary employer did business. These circumstances do not prevent the picketing here from directly affecting the neutral businesses located on the same premises; their interest in being free from economic pressures in disputes not their own cannot be overlooked without nullifying a prime purpose of Section 8(b)(4)(A). Accordingly, the lawfulness of the picketing of the Crystal Palace Market is to be tested by the "common situs" standard, i.e., whether it was confined, as nearly as possible, to the operations of the primary employers.

B. The Board's conclusion that the picketing was not so confined, but rather was directed at the employees of the neutral employers in the Market in order to bring indirect pressure against Long, is amply supported by the record. Thus, Local 648 declined Long's invitation to station its pickets inside the Market at the particular stands involved in the dispute, but

chose rather to align the pickets at the street entrances, where neutral employees would be forced to cross the picket line in order to report for work. That Local 648 chose this method of picketing so that it could reach neutral employees is evidenced by the reason given for refusing to picket inside the Market—that inside picketing "wouldn't give [Local 648] the economic force that [it] needed" (R. 188-189). Similarly, the same impermissible attempt to bring about a work stoppage by neutral employees is shown by the stationing of pickets at one of the main entrances to the Market which did not lead directly to any of the shops operated by primary employers. Local 648's intent to reach neutral employees is also shown by union agent Savin's direct oral appeals to two such employees to leave the Market during the picketing. This oral inducement demonstrated to neutral employees that the picketing was directed at them, and constituted as well an independent violation of Section 8(b)(4)(A). Finally, the close cooperation throughout the contract dispute between Locals 648 and 1017 shows that the picketing was intended by Local 648, and was fully understood by the members of Local 1017, who were not involved in the dispute, to elicit their sympathetic action by refusing to cross the lines. In sum, the picketing constituted a deliberate extension of the dispute to neutrals and Local 648 thereby violated Section 8(b)(4)(A).

II

Local 1017, by adopting and enforcing a policy of requiring its members not to cross the picket lines at the Crystal Palace Market, in effect called its members out on a sympathetic strike. Imposition of such a

strike falls squarely within the ban of Section 8(b)(4)(A), and thus Local 1017 also violated that section. *N.L.R.B.* v. *Denver Bldg. & Constr. Trades Council,* 341 U.S. 675.

III

There is no merit to petitioners' contentions that the Crystal Palace Market tenants were not neutrals in the contract dispute, and that they did not do business with Long within the meaning of Section 8(b)(4)(A).

A. The Board properly rejected petitioners' factual defense that the businesses of the tenants were subject to Long's control, and that they therefore were allied with Long in the contract dispute and were not entitled to the protection given neutral employers by Section 8(b)(4)(A) of the Act. The tenants whose employees were found to have been unlawfully induced to cease working were unconcerned with the merits of the contract dispute, and could not by themselves grant any of Local 648's demands. And, as the record shows, these tenants carried on their enterprises without any substantial amount of supervision or control by Long—in buying, selling, financing their businesses, and handling of employment they were entirely independent. In sum, Long's control over the tenants was less than that exacted by the general contractor over the subcontractors in *N.L.R.B.* v. *Denver Bldg. & Constr. Trades Council,* 341 U.S. 675, where the Supreme Court held the latter to be neutrals and within the protection of Section 8(b)(4)(A). Accordingly, each of the tenants in this case who was not directly involved in the contract dispute was entitled to carry on his business free from pressures directed against him because of Local 648's demands against Long.

B. Under the leases in effect at the Crystal Palace Market, Long received a percentage of the tenants' receipts over a fixed minimum, and handled advertising for the entire Market. Both of those arrangements would be disrupted in the event that the tenants' shops were closed down as a result of a picket line. Accordingly, and contrary to petitioners' contention, an object of picketing directed at the employees of the tenants was, as found by the Board, to force such tenants to cease doing business with Long. Moreover, such picketing also had the object of requiring the tenants to cease doing business with their suppliers and others, which is also proscribed by Section 8(b)(4)(A).

ARGUMENT

The Board Properly Found That Locals 648 and 1017 Violated Section 8(b)(4)(A) of the Act by Their Picketing and Allied Activities in Connection With the Contract Dispute Between Local 648 and the Grocers Association

A. Local 648's picketing of the Crystal Palace Market and its oral inducements of neutral employees to cease working fell within the prohibition of Section 8(b)(4)(A)

1. *The Crystal Palace was a "common situs" and therefore the union was required to confine its activity, as nearly as possible, to the primary employers*

Section (8)(b)(4)(A), commonly referred to as the secondary boycott provision of the Act, provides that it is an unfair labor practice for a union:

> to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employ-

> ment to . . . perform any services where an object thereof is . . . forcing or requiring . . . any employer or other person to . . . cease doing business with any other person.

As this Court has stated, Congress has undertaken by this Section "to narrow the area of industrial strife . . . [and to that end] has in effect banned picketing when utilized to conscript in a given struggle the employees of an employer who is not himself a party to the dispute." *Printing Specialties Union, Local 388* v. *LeBaron,* 171 F. 2d 331, 334. The Board found in the instant case that the picketing at the Crystal Palace Market implicated neutral employees and employers—the fruit and vegetable stand employees and their employers, at least—in the contract dispute between Local 648 and the Grocers Association.[7] The involvement of such neutrals, moreover, was found to have been accomplished by means and for purposes which the language of Section 8(b)(4)(A) forbids. Thus, by picketing the Crystal Palace Market, Local 648, paraphrasing the statutory language, induced employees of neutral employers (the operators of fruit and vegetable stands) to refuse to perform services. Further, in view of the disruption and discontinuation of the neutral shop owners' businesses that would inevitably result from the refusal of their employees to work, "an object" of this inducement necessarily included the forbidden one of interrupting the business of the neutral employers with

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[7] Petitioners' contention (Br. 15-21) that the tenants in Crystal Palace Market were not neutrals in the contract dispute between Local 648 and the Grocers Association is answered *infra*, pp. 29-32.

Long, as well as with their suppliers and other persons with whom they did business.[8]

It is true, as petitioners assert (Br. 11-13, 24-27), that not every involvement of neutral employees and employers in a labor dispute falls within the ban of Section 8(b)(4)(A). Concomitant with the proscriptions of this provision, the Act, in Sections 7 and 13,[9] protects "concerted activities and strikes between the primary parties to a labor dispute." *N.L.R.B.* v. *Denver Building & Construction Trades Council,* 341 U.S. 675, 687. In combination, these sections reflect "the dual congressional objectives of preserving the right of labor organizations to bring pressure on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *N.L.R.B.* v. *Denver Bldg. & Constr. Trades Council,* 341 U.S. 675, 692. To accommodate these twin objectives, the courts have recognized a difference under the Act between such traditional primary activity as a picket line located at premises occupied solely by an employer with whom the picketing union has a dispute, and a picket

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[8] We answer more fully *infra,* pp. 32-33, petitioners' contention that the tenants in Crystal Palace Market did not do business with Long, and therefore that the picketing could not have had the object forbidden by Section 8(b)(4)(A). It suffices to note here that, pursuant to the leases with the tenants, Long received a percentage of their profits over a fixed minimum and handled advertising for the entire Market (R. 39-40; 196-197), both of which arrangements would be disrupted were the tenants closed down by the picketing.

[9] Section 7 safeguards the right of employees to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection," and Section 13 guarantees "the right to strike," except as the Act "specifically" qualifies that right. Both Sections are quoted in full in Appendix B, *infra,* p. 35.

line located at the premises of an employer who is not a party to the dispute. Thus, the proscription of Section 8(b)(4)(A) has been held not to reach the first of these situations, even though neutral employees having business at the site of the dispute might be induced not to cross the picket line,[10] whereas the extension of the dispute to a neutral employer's premises, which is brought about by the second situation, has been held violative of Section 8(b)(4)(A).[11]

The facts of the present case do not fit squarely into either of these polar situations. For the Crystal Palace Market, the site of the picketing, is occupied jointly for full time business purposes by Long and Standard (the employers named on the picket signs as involved in the labor dispute), and by a large number of independent employers who were entirely neutral in the dispute. Such "common situs" situations, which have frequently arisen in the administration of Section 8(b)(4)(A), require a further accommodation. To disallow common situs picketing altogether would cut too deeply into the right of unions, preserved in the Act, "to bring pressure to bear on offending employers in primary labor disputes" (*Denver Bldg. & Const. Trades Council* case, *supra*, p. 17). At the same time, recognition of the protection Congress wished

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[10] See, *International Rice Milling Co.* v. *N.L.R.B.*, 341 U.S. 665, 670-673; *DiGiorgio Fruit Corp.* v. *N.L.R.B.*, 191 F. 2d 642, 649 (C.A.D.C.), certiorari denied 342 U.S. 869; and the Board's Decision in this case (R. 71, n. 10); cf. *N.L.R.B.* v. *General Drivers Local 968*, 225 F.2d 205, 210 (C.A.5), certiorari denied, 350 U.S. 914.

[11] See, *Printing Specialties Union, Local 388,* v. *LeBaron,* 171 F.2d 331, 334 (C.A.9). Cf. *N.L.R.B.* v. *Washington-Oregon Shingle Weavers*, 211 F.2d 149, 152 (C.A. 9); *Amalgamated Meat Cutters, Local 88* v. *N.L.R.B.*, 237 F.2d 20, 26 (C.A.D.C.), certiorari denied, 25 L.W. 3246.

to afford neutral employers precludes allowance of the same unrestricted scope for picketing at a common situs as that permitted at a primary situs. As the Board has stated, "the enmeshing of premises and *situs* qualifies both . . . the right of a union to picket at the site of its dispute [and] the right of a secondary employer to be free from picketing in a controversy in which it is not directly involved." *Sailors Union of the Pacific,* 92 NLRB 547, 549. The principle which has evolved out of the foregoing considerations, as stated by the Board in this case, is that in a common situs situation avoidance of the proscriptive reach of Section 8(b)(4)(A) requires that "the picketing be so conducted as to minimize its impact on neutral employees," insofar as practical (R. 69). This principle has been uniformly applied by the courts. That is, where the time or manner of the picketing, the legend on the signs, or other relevant considerations [12] have shown that common situs picketing was directed at neutral employees, the activity has been found violative of Section 8(b)(4)(A). See *N.L.R.B.* v. *Truck Drivers Local 728,* 228 F. 2d 791, 796 (C.A. 5); *Piezonki* v. *N.L.R.B.*, 219 F. 2d 879, 883 (C.A. 4);

[12] In *Sailors Union of the Pacific,* 92 NLRB 547, 549, the Board indicated that relevant criteria for determining the lawfulness of common situs picketing included the following: (1) whether the picketing occurs at a time when the situs of the dispute is located at the picketed premises, (2) whether the primary employer is carrying on its normal business where and when the picketing occurs, (3) whether the picketing occurs reasonably close to the situs of the dispute, and (4) whether the picketing discloses clearly that the dispute is with the primary employer. See also *Washington Coca-Cola Bottling Works, Inc.,* 107 NLRB 299, which emphasizes a further factor, the availability of alternative premises occupied exclusively by the primary employer which might be effectively picketed.

N.L.R.B. v. *Local 55, Carpenters,* 218 F. 2d 226, 230-231 (C.A. 10); *N.L.R.B.* v. *Denver Bldg. & Const. Trades Council,* 219 F, 2d 870, 873 (C.A. 10); *N.L.R.B.* v. *Teamsters Local 135,* 212 F. 2d 216, 219 (C.A. 7); *N.L.R.B.* v. *Service Trade Chauffeurs,* 191 F. 2d 65, 199 F. 2d 709 (C.A. 2).[13]

The basic question in this case, which we consider in "2" below (pp. 22-27), is whether the Board was warranted in concluding that the picketing here was not conducted in such a way as to minimize its impact on neutral employers, but was, indeed, directed at them. Before turning to this question, however, we deal with petitioners' assertion (B. 27) that "the Crystal Palace Market was the specific primary situs of the dispute." This contention apparently means that the Market should be treated as though exclusively occupied by primary employers because it was owned by Long, one of the primary employers, and because he operated various retail operations there. But these circumstances do not take the Market out of the category of a common situs, for the fact remains that other, neutral employers were independently carrying on their businesses at the same place. These neutral employers have an interest in being protected at their place of business from economic pressures in disputes not their own,[14]

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[13] The common situs cases in which the Board's orders have not been enforced do not indicate an absence of judical approval of the Board's principle, but rather disagreement over the significance to be attached to particular facts in the application of that principle. See, *Sales Drivers Local 859* v. *N.L.R.B.*, 229 F. 2d 514, 517 (C.A. D.C.) certiorari denied 351 U.S. 972; *N.L.R.B.* v. *General Drivers Local 968,* 225 F. 2d 205, 210 (C.A. 5), certiorari denied, 350 U.S. 914.

[14] The legislative history makes clear beyond question that such protection to neutral employers was one of the primary objectives of Section 8(b)(4)(A). See S. Rep. No. 105, 80th Cong., 1st Sess., p. 22, 54; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 43; 93 Cong. Rec. 3838, 4837-8, 4858, 5011, 5014-5, 7537, A-2252.

and the mere accident that title to the property rests with another affords no justification for overlooking their interest. In short, unless the interest of the neutral employers at the Crystal Palace Market in being free from the pressure of picketing is recognized in this case through the application of the rules pertaining to common situs picketing, the purpose of Section 8(b)(4)(A) will be thwarted.

The validity of this conclusion is attested by *N.L.R.B.* v. *Local 55 Carpenters,* 218 F. 2d 226 (C.A. 10). The picketing in that case occurred on premises owned and occupied by the primary employer, but was nonetheless found to be violative of Section 8(b)(4)(A) because, as in this case, neutral employers and employees were carrying on their businesses at the same premises and the picketing was not adequately confined to the primary employer and his employees (218 F.2d at 230-231). See also *United Brick & Clay Workers* v. *Deena Artware,* 198 F. 2d 637, 643 (C.A. 6), certiorari denied, 344 U.S. 897. Cf. *Incorporated Oil Co.,* 116 NLRB No. 271, 39 LRRM 1106 (December 20, 1956). The Crystal Palace Market can no more be viewed as though occupied exclusively by Long, for purposes of determining the scope of allowable picketing in the dispute to which Long was a party, than could the picketed premises in the *Local 55* case be regarded as primary in the determination of the lawfulness of the picketing there. In both cases the concurrent presence of neutral and primary employers requires, as shown above, that picketing, to qualify as permissible primary activity, be strictly confined to the operations of the primary employer, and that all practical steps be taken to minimize its effect on employees of the neutral employers.

2. *Local 648 failed to confine its picketing to the employers with whom it had a dispute*

The vice of the picketing in the instant case lies in the fact, as the Board found, that the picketing was not conducted so as to have as little impact on neutral employers as possible, but instead was directed at them. Thus, on the day before the picketing began, Manager Haag, on behalf of Lang, expressly invited Local 648 to station its pickets inside the Crystal Palace Market at the particular stands involved in the dispute, rather than to picket at the entrances to the market through which neutral employees passed (*supra,* p. 6). It is apparent that Haag made this offer in an effort to concentrate the effects of the picketing on the employers involved in the dispute, and thereby permit the neutral employers in the market to carry on their businesses as usual. And, as the Board observed, such a disposition of the pickets might well have left the neutrals free of the coercive effects of the picketing, thereby achieving the objective of Section 8(b)(4)(A), for "there would have been no need for employees of neutrals to cross any of the picket lines" (R. 72, n. 12).

Contrary to petitioners' contention (Br. 31-32), the arrangement of the selling floor of the Crystal Palace Market would have made picketing of individual stands both a practical and an effective way of advertising the dispute in the area where Local 648 was entitled to carry on primary activities, i.e., the exact site of the primary businesses. There is no reason, apart from petitioners' bare assertion (Br. 32), to assume that the aisleways within the Market were incapable of accommodating a picket patrolling a particular stand, or that a picket could not utilize the place of ingress or egress

of those shops which had checking counters and turnstile entranceways. Moreover, the claim that such picketing would have "disrupted all activities inside [the Market]" (Br. 32) is without force in view of the fact that Long's officials, whose interests, and not those of Local 648, were at stake in maintaining a free flow of traffic in the Market, believed that inside picketing was completely practicable. Appropriately worded signs, furthermore, could easily identify the particular stand being picketed, contrary to petitioners' claims that such picketing would confuse customers and neutral employees (Br. 32). In sum, patrolling beside the particular stands in dispute would have communicated the fact that Local 648 was on strike both to potential customers and other persons having business with the particular stands—the legitimate purposes of the primary activity which the Act protects. At the same time, such patrolling would have eliminated the necessity for neutral employees to cross a picket line in order to report for work—a result which Section 8(b)(4)(A) seeks to alleviate. Accordingly, Local 648's rejection of the invitation to confine its pickets to particular shops within the market can only be explained on the ground that it did not desire to limit picketing to the primary employers, and instead determined to increase the severity of its economic sanction by reaching the employees of neutrals. Compare *N.L.R.B.* v. *Denver Bldg. & Const. Trades Council,* 219 F. 2d 870, 873 (C.A. 10). Indeed, the secretary of Local 648, Claude Jinkerson, in effect admitted to such a purpose when he declined to picket inside the Market, not because he felt that such picketing would not be practical, but because it "wouldn't give him the economic force that he needed" (R. 188-189).

Local 648's determination to extend the effect of its picketing beyond the employers involved in the dispute was also manifested by its action in placing pickets at an entrance to the Crystal Palace Market which did not lead directly to any of the shops operated by primary employers. Thus, as stated, *supra,* p. 7, pickets were stationed at all three of the main entrances on Market Street, although only two of these were in the immediate vicinity of shops operated by a primary employer, Long (See G.C. Ex. 19, *infra,* p. 38). Entrance 3 (denoted "3" on G.C. 19) would not ordinarily be used by persons wishing to shop at the stands served by the other two entrances, and, even if such persons were to use 3, they could not fail to observe the pickets at the other two entrances which were only several feet distant. Again, Local 648's failure to confine its picketing in this respect can only be explained, as the Board concluded, "on the ground that its strategy was not merely to reach persons having dealings with Long but also to impose the necessity of crossing a picket line upon other persons, constituting the bulk of the traffic through entrance 3, including necessarily employees of neutrals operating the stands most directly served by that entrance" (R. 73).

Further supporting the Board's conclusion that the picketing was aimed at generating strike pressures against neutral employers is the oral inducement by union representative Pat Savin of two neutral employees to leave the Crystal Palace Market during the picketing (*supra,* pp. 9-10). Petitioners do not seriously contest the correctness of the Board's finding that such direct inducement of neutral employees is violative of Section 8(b)(4)(A) irrespective of the

legality of the picketing itself.[15] See pp. 18-20, *supra*. And see *N.L.R.B.* v. *Local 74,* 341 U.S. 707, 710, 712-713; *N.L.R.B.* v. *Local 1976*, decided February 12, 1957, 39 LRRM 2428, 2433, (C.A. 9); *N.L.R.B.* v. *Denver Bldg. & Const. Trades Council,* 219 F. 2d 870, 873 (C.A. 10); *N.L.R.B.* v. *Teamsters Local No. 135,* 212 F. 2d 216, 218-219 (C.A. 7).[16] This conduct, moreover, has the

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[15] The argument in petitioners' brief does not treat this finding but in their Statement of the Case petitioners appear to suggest that in one instance Savin's direction to a neutral employee to leave the Market was prompted by Savin's belief that the shop owner was working the employee in breach of a term of the collective agreement between the fruit and vegetable stand operators and Local 1017, and not by an effort to enforce Local 648's picket line against members of Local 1017 (Br. 9). Savin, however, did not refer to any such alleged breach when he ordered the neutral employees out of the Market (*supra,* pp. 9-10). In view of Savin's picket line activities, his temporary assignment to the picketing union, the fact that his order to leave the Market occurred during the picketing activity of Local 648, and the overall showing of Local 1017's support of the picketing (pp. 8-10, *supra*), there is ample basis for the Board's conclusion that his oral inducement represented an effort to prevent neutral employees from working during Local 648's picketing activities.

[16] Petitioners do not mention in their brief, and thus presumably do not contest, the Board's additional finding that both Locals 648 and 1017 are answerable for this plain violation of the Act. As stated *supra,* p. 9, Savin had been temporarily assigned to help Local 648 during its dispute with the Grocers Association, and thus that union was bound by his conduct as its agent during the period in question. At the same time Savin's removal of two members of Local 1017 from the Market during the picketing was in direct implementation of Local 1017's policy of requiring its members to respect the picket line, and thus was well within the scope of his actual as well as his apparent authority to carry out Local 1017's policy. Accordingly, Local 1017 is also bound by his conduct in this respect. Alternatively, both sister Locals are also answerable for Savin's activities, as the Board held, inasmuch as both were engaged in a joint venture in bringing economic pressures to bear at the Crystal Palace Market to further Local 648's position in the contract dispute with the Grocers Association. Cf.

added significance of showing that the picketing was not meant to be confined to the primary employers, but rather was directed at neutrals. For Savin's instructions to the two neutral employees to leave their places of employment in the Market at a time when pickets were aligned around the building can only be viewed as an effort to police the picket line. In short, Local 648 through its agent took effective steps to show neutral employees that the picketing was directed at them. Cf. *N.L.R.B* v. *Denver Bldg. & Const. Trades Council,* 219 F. 2d 870, 872 (C.A. 10); *N.L.R.B.* v. *Local Union No. 55,* 218 F. 2d 226, 231 (C.A. 10); *N.L.R.B.* v. *Teamsters Local No. 135,* 212 F. 2d 216, 218-219 (C.A. 7).

Finally, the fact that the picket line here was aimed at neutral employees is shown by its effect on members of Local 1017, See *N.L.R.B.* v. *Business Machine Local 459,* 228 F. 2d 553, 560 (C.A. 2), certiorari denied, 351 U.S. 962. Participation by Local 1017's Secretary-Treasurer, Allen Brodke, in the February 14 meeting between Local 648 and Long which precipitated the picketing, and the announced intention of Local 1017 to support any picketing which should arise out of the labor dispute (*supra,* pp. 8-9), indicate that Local 648 knew and expected that the members of Local 1017 would understand that they were to strike their employers when the pickets appeared. Local 648 did nothing to alter the impression of Local 1017 and its members that the picketing was to be directed at such responsive action on their part. Instead, as shown

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Taylor v. *Brindley,* 164 F. 2d 235, 241 (C.A. 10). The facts described (*supra,* pp. 8-10), pertaining to Local 1017's participation in the strike and picket line activity fully support this conclusion.

more fully, *infra,* pp. 27-28, the close cooperation of the two Locals throughout the dispute, both before and during the picketing, provides ample support for the Board's conclusion (R. 75, n. 14) that the picketing was undertaken as a joint venture by both unions, and was intended by both to bring about what did in fact ensue—i. e., a refusal by the neutral employee members of Local 1017 to work for their employers.

In sum, a consideration of all relevant circumstances leads to the conclusion that Local 648's picketing was not restricted to the primary employers, but was calculated to reach neutral employees and cause them to cease work. This conclusion alone explains Local 648's declination to picket the primary employers at their stands inside the Market; its picketing of an entrance to the Market which did not directly lead to any of the primary employer's stands; its agent's conduct in directing neutral employees to leave the Market; and the refusal to cross its picket lines by neutral employees who were members of a sister local which strongly supported the picketing. The picket lines, therefore, constituted the kind of deliberate extension of the dispute to neutrals which is forbidden by Section 8(b)(4)(A).

B. By requiring its members to respect Local 648's picket line Local 1017 also violated Section 8(b)(4)(A).

As shown, *supra,* pp. 8-10, Local 1017 adopted and enforced a policy of requiring its members to honor Local 648's picket lines at the Crystal Palace Market. This policy was openly revealed to the operators of the fruit and vegetable stands a day or so before the picket-

ing began, and was put into effect as soon as the pickets appeared. Thus, when the lines were established on the morning of February 15, the fruit and vegetable operators found themselves without employees (*supra,* p. 9). In short, when Local 648 picketed, Local 1017 called its members out on a sympathetic strike. Cf. *Schauffler* v. *Highway Truck Drivers Local 107,* 230 F. 2d 7, 12 (C.A. 3).

There can be no doubt that the imposition of this strike by Local 1017 was a violation of Section 8(b)(4)(A) of the Act on its part. It is precisely the kind of conduct which the Supreme Court found to be illegal in *N.L.R.B.* v. *Denver Bldg. & Const. Trades Council,* 341 U.S. 675. See also *Washington-Oregon Shingle Weavers* v. *N.L.R.B.,* 211 F. 2d 149 (C.A. 9). That is, as noted by the Supreme Court, Section 8(b)(4)(A) prohibits not only inducements of neutral employees by labor organizations directly involved in a labor dispute (the picketing by Local 648 in this case), but also sympathetic strikes of neutral employees called by their labor organizations. 341 U.S. at pp. 685-686. See also *International Brotherhood of Electrical Workers* v. *N.L.R.B.,* 341 U.S. 694, 700. The strike by Local 1017, like that in the *Denver* case, was not as a result of a dispute between the members of Local 1017 and their neutral employers, but merely for the purpose of bringing pressure to bear on other employers (e.g., Long) involved in a primary dispute with sister Local 648. Such a strike falls squarely within the ban of Section 8(b)(4)(A).[17]

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[17] See H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 43, where, as an example of conduct violating Section 8(b)(4)(A), the report states that it is "made an unfair labor practice for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B."

C. There is no merit to petitioners' contentions that the tenants were not neutrals in the labor dispute, and that they did not do business with Long within the meaning of Section 8(b)(4)(A)

1. *The contention that the tenants were not neutral employers*

Invoking the principle that Section 8(b)(4)(A) was designed to protect only those employers who are neutrals in a labor dispute, petitioners claim immunity for their conduct in this case on the ground that the tenants in Crystal Palace Market were allied with Long in its labor dispute with Local 648 because Long "has almost complete managerial supervision and control and a direct financial interest in the operations of the [tenants]" (Br. 19). The record, however, amply supports the Board's rejection of this factual defense, and its finding that the tenants "were not allies of Long, . . . [but were] neutral employers entitled to the protection of Section 8(b)(4)(A) of the Act" (R. 67).[18]

Thus, the relationship between Long and its tenants is simply one of lessor-lessee, with the latter operating independent retail enterprises on Long's premises (R. 18, 40; 197-198). Under the leases, Long is entitled to inspect the stands of the tenants for cleanliness and orderliness, periodically to audit the books of the operators, and to prorate advertising expenses which it incurs for the entire market (R. 39-40; 196-198). Rentals are fixed by a minimum sum plus a percentage of receipts (R. 18; 197). But, apart from the fore-

[18] This finding, of course, does not pertain to those tenants who, like Long, were parties to the dispute through their membership in the Grocers Association and their bargaining relation with Local 648 (p. 4, *supra*).

going arrangements designed to protect Long's interests as a lessor, the tenants carry on their businesses without interference or supervision. Each tenant hires, fires and supervises his own employees, and is completely automonous from Long in arranging for their terms and conditions of employment (R. 66; 198). Indeed, the majorty of the tenants carry on wholly independant collective bargaining relationships with a variety of unions (R. 23; 200, 404-406). Each tenant also independently provides for his own working capital, and carries on all other phases of his business without the interference or supervision of Long (R. 66; 196-198, 226, 237). In short, each tenant is an independant operator of his particular business.

In these circumstances, resolution of the issue which petitioners seek to raise is controlled by the decision in *N.L.R.B* v. *Denver Bldg. & Const. Trades Council,* 341 U.S. 675, where the Supreme Court rejected the analogous contention that the relationship between a subcontractor and contractor on a job site was such as to make the latter a non-neutral in a labor dispute involving the former. There, though the primary employer had "some supervision over the [neutral employers'] work," this factor was held not to "eliminate the status of each as an independent contractor or make the employees of one the employees of the other." 341 U. S. at 689-690. See also *N.L.R.B.* v. *Teamsters Local No. 135,* 212 F. 2d 216, 217-218 (C.A. 7) (involving a lessor-lessee relationship); *N.L.R.B.* v. *Denver Bldg. & Const. Trades Council,* 219 F. 2d 870, 872-873 (C.A. 10); *N.L.R.B.* v. *Carpenters Union,* 184 F. 2d 60, 64 (C.A. 10); *N.L.R.B.* v. *Wine, Liquor & Dist. Workers,* 178 F. 2d 585, 587 (C.A. 2).

The facts of the relationship in the present case, viewed in the light of the foregoing authority, leave no room for petitioners to argue, as they attempt to do (Br. 17), that control by Long over its tenants is shown by Manager Haag's statement to them before the picketing occurred that he would not permit any of the tenants directly involved in the contract dispute to open for business if they had not signed a contract with Local 648. Even apart from whether Haag could validly enforce this threat under the leases, it should be noted that Haag's statement covered only the tenants who were themselves involved in the dispute with Local 648, and not the neutral tenants whose independence petitioners question. It is to be noted, moreover, that Haag made clear to the former tenants "that any decision they made [respecting the Union's proposed contract] had to be their own" and that he "had no desire to tell them one way or the other" (R. 202). Moreover, whatever significance may be attributed to Haag's remark, it does not alter the controlling factors, described *supra,* p. 29-30, which show the tenants to be indepedant business men.[19] Furthermore, it is plain that the tenants whom the Board found to be neutrals were wholly unconcerned with the merits of the dispute between Local 648 and the Grocers. Nor could these tenants by themselves grant any of Local 648's demands. The inducement of their employees to cease work could have but one objective: the impermissible one of bringing indirect pressure on Long to force his acquiescence to Local 648's contract demands. In sum, the Crystal Palace Market is not one, but a collection of many independent retail operations. And each is

[19] See *United States* v. *Silk,* 331 U.S. 704, 716.

entitled under the Act to carry on its business free from pressure of work stoppages designed to support a labor dispute in which it is not involved.[20]

2. *The contention that the tenants do no business with Long which it was the object of the picketing to disrupt*

Petitioners attack the Board's finding that the object of petitioners' activities in this case was to force the tenants "to cease doing business with Long" (R. 76) on the ground that Long and the tenants were not "doing business" with one another within the statutory meaning of that phrase (Br. 22-24). Petitioners correctly observe that the Board's order in this respect refers to the business relation between the tenants and Long "in the latter's capacity as owner of Crystal Palace Market" (R. 76), but incorrectly assert "The only way that these parties could 'cease doing business' is if the lessees were to terminate their lease," an object alleged not to have been shown (Br. 23). Petitioners overlook the fact that under the leases Long re-

[20] Petitioners attempt to bring this case within the rule which deprives secondary employers of the protection of Section 8(b)(4)(A) when they perform the primary employer's work for him during a strike against him (Br. 20-21). As petitioners would have it, the tenants who had signed contracts with Local 648 and remained open for business during the picketing (p. 7, *supra*) were in such an allied relationship with Long. But this does not aid petitioners. For, as we have shown (*supra*, pp. 22-27), the inducement of the picket line was directed to all neutral employees, particularly those who were members of Local 1017; the record contains no suggestion by any of the parties or witnesses that it was limited in its appeal to the employees of the few tenants who had already signed with Local 648. Moreover, these few tenants did not operate general groceries which might have taken any substantial trade from Long's shop, as suggested by petitioners (Br. 20-21), but included a catering service, a dried fruit shop and a delicatessen (R. 411). Nor does the record show that Long made any attempt to direct his consumer trade to these shops during the picketing.

ceives a percentage of the tenants' receipts over a fixed minimum and handles advertising for the entire market (R. 39-40; 196-197). Plainly both of these arrangements would be disrupted in the event that the tenants were closed down as a result of a picket line. It scarcely may be gainsaid that such partial disruptions in the business relations between neutral and primary employers are included within the phrase "cease doing business" as used in Section 8(b)(4)(A). Cf. *I.B.E.W.* v. *N.L.R.B.,* 181 F.2d 34, 37 (C.A 2), affirmed, 341 US. 694.

Moreover, the Board's finding of a violation in this case does not rest alone on petitioners' objective to force the tenants to cease doing business with Long. The Board also found that an object of the picketing and oral inducement was to require the tenants to cease doing business "with other employers" (R. 76), i.e., the suppliers of their shops and others with whom they had business relations. Such an objective was an inevitable concomitant of petitioners' efforts to close down the neutral shops. Indeed, as we have shown (*supra,* p. 8), union officials warned operators of the fruit and vegetable stands before the picketing began to protect themselves against the expected refusal of their employees to report for work by "buying light," or, in other words, by reducing the amount of their business with their suppliers. Since the statute broadly interdicts the object of cessation of business between a neutral employer and "any other person," it plainly encompasses business dealing involving such suppliers as well as those involving the primary employer. See *United Marine Division, Local 333,* 107 NLRB 686, 709-711, enforced by consent decree entered January 5, 1955 (C.A. 2).

CONCLUSION

For the foregoing reasons it is respectfully requested that the petition to set aside the Board's order be denied and that the Board's order be enforced in full.

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APRIL, 1957.

APPENDIX A

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or portection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

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Sec. 8(b). It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) To engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manu-

facturer, or to cease doing business with any other person;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

* * * * *

Sec. 10(e). The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board,

its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

* * * * *

LIMITATIONS

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

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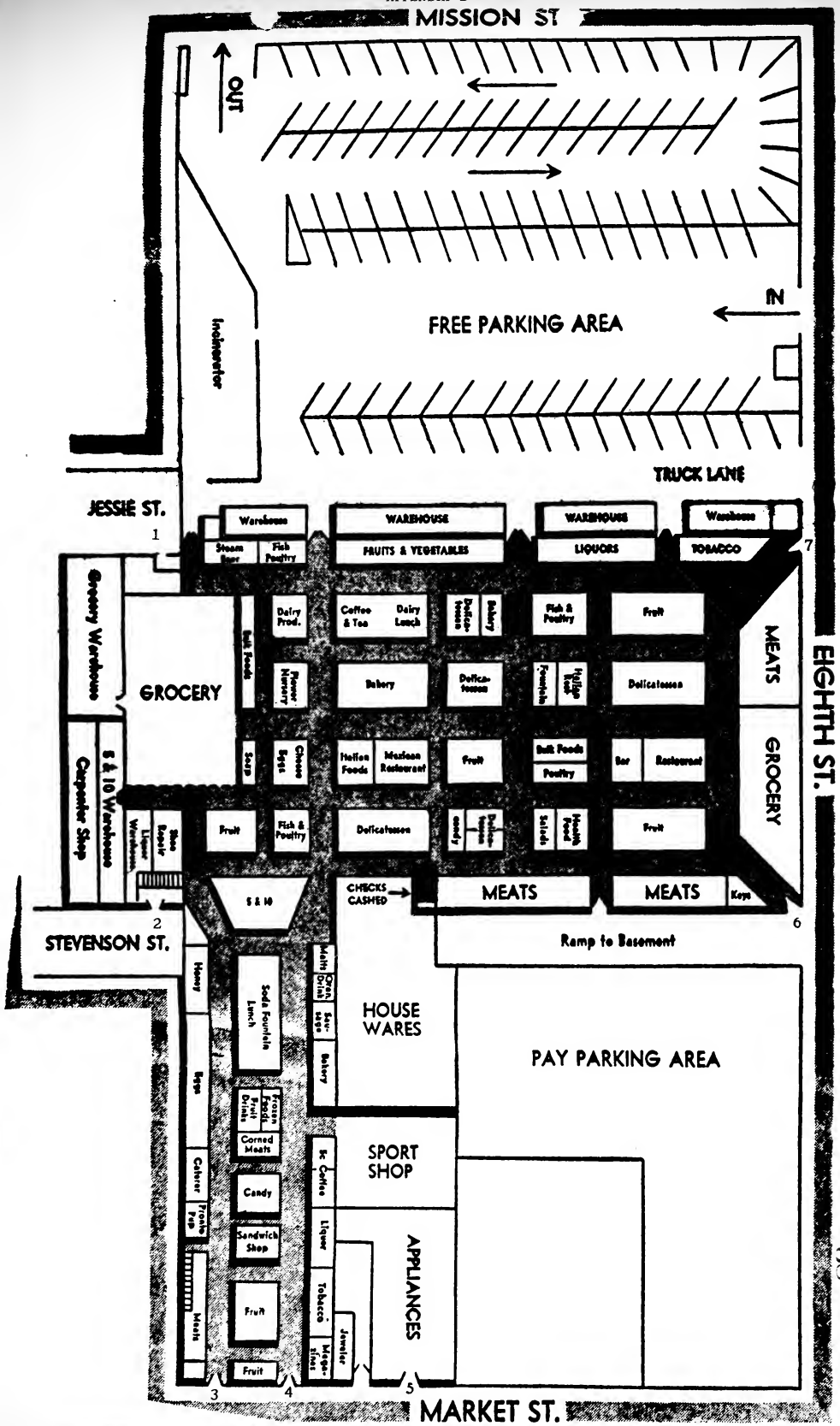
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Coffee & Tea
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Fish & Poultry
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Bulk Foods
Flower Nursery
Bakery
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Fountain
Health Foods
Delicatessen
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Eggs
Cheese
Italian Foods
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No. 15306.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LAS PALMAS FOOD COMPANY, INC., a corporation; PABLO BACA GAVALDON and RALPH WORTHINGTON,

Appellants,

vs.

RAMIREZ & FERAUD CHILI CO., a co-partnership composed of Frand Feraud and E. C. Feraud,

Appellee.

APPELLANTS' OPENING BRIEF.

Jurisdictional Facts.

This is an appeal by defendants from an Order of the District Court for the Southern District of California, Central Division. The Order entered July 27, 1956, denied defendants' motion to dismiss and granted plaintiff's motion for preliminary injunction. [*R. 72.] Also appealed from is the Preliminary Injunction thereupon issued, dated July 30, 1956. [R. 76.] The Notice of Appeal, filed August 24, 1956, appears on pages 81 and 82 of the Transcript of Record.

The Order and Preliminary Injunction were issued on an Amended Complaint and various supporting papers in

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*Transcript of Record.

a controversy allegedly arising under the Trade-Mark and Unfair Competition Laws of the United States. (Public Law 489, 79th Congress, Chapter 540, approved July 5, 1946, Chapter 22 of Title 15 of the United States Code.) Jurisdiction of the District Court was based on that statute. [R. 26 and 70.]

This Court has jurisdiction to review the order and injunction under 28 U. S. C. 1292(1). The inquiry on such appeal extends to the alleged lack of jurisdiction of the District Court and to the alleged inadequacy of the complaint, these also being the contentions on which defendants' Motion to Dismiss was based. [R. 51.] (See *Riverbank Laboratories v. Hardwood Products Corp.*, 220 F. 2d 465, 466 (C. C. A. 7, 1955).)

Concise Statement of the Case.

The Findings of Fact [R. 53-70], which substantially follow the Amended Complaint [R. 25-42], show the case to be as follows:

Plaintiff, a partnership composed of California residents and citizens, is the owner in the United States of the trade-mark "Las Palmas" for various canned foods and condiments. Plaintiff's United States registration is now incontestable under the federal Trade-Mark Act. Plaintiff's products are sold and advertised under said trademark in both the United States and the Republic of Mexico. Plaintiff has not registered its trade-mark in Mexico, but plaintiff has sold there under its trade-mark since 1948, particularly in northwestern Mexican border cities such as Mexicali, Tijuana, and Ensenada, and plaintiff has developed good will associated with its mark in Mexico.

In Mexico one Fernando De La Pena of Tijuana, Baja California, applied to register the trade-mark "Las Palmas" on October 28, 1953; the Mexican authorities issued such a registration to him on February 10, 1954. This registration has not been cancelled.

Defendants are a California corporation (Las Palmas Food Company, Inc.), a California resident and United States citizen (Ralph Worthington), and a Mexican citizen residing in Los Angeles (Pablo Baca Gavaldon). With knowledge of plaintiff's good will and trade-mark, and to trade on the same, defendant Gavaldon on November 30, 1954, became assignee of the Mexican registration "Las Palmas" and defendants with said knowledge and intent have been using said trade-mark to process, distribute and sell canned food products *in Mexico.* The packaging and dress of the goods of plaintiff and defendants are substantially similar and would confuse and mislead purchasers, some of whom carry their purchases back to the United States.

The main issue before the District Court and the main issue before this Court on this appeal is whether the defendant-appellants should be enjoined from using in Mexico the registered mark of which they are the owners in Mexico. Stated otherwise, Do our courts have jurisdiction to enjoin the acts of defendants in Mexico, and, alternatively, if there is jurisdiction of the subject matter, does the complaint, because of the principle of comity, state a claim upon which relief can be granted?

On defendants' Motion to Dismiss [R. 51] and on defendants' Opposition to Plaintiff's Motion for Preliminary Injunction [R. 49], the District Court answered each of the above questions in the affirmative and in favor of the plaintiff.

Detailed Statement of the Case.

The facts include not only the above, *e.g.,* that plaintiff's mark is registered under the Lanham Act and that defendants' mark is registered under the Mexican trade-mark statutes, but also the following nexus of matters from which the District Court found it had jurisdiction:[1]

The corporate defendant, Las Palmas Food Company, Inc., was so named by defendant Worthington to trade on plaintiff's good will, and all defendants, who associated about 1953, knew of plaintiff's good will associated with plaintiff's trade-mark. Defendant Baca had formerly purchased plaintiff's "Las Palmas" products for resale. [R. 60-62.]

Defendants printed their "counterfeit" labels in the United States and secured cans and cartons in the United States for their operations in Mexico. Defendants sell their products in cities in Mexico where plaintiff's products are also sold, and purchasers would be confused by the packaging and dress thereof. Defendants intent was to trade on plaintiff's good will in Mexico. [R. 62-63.]

Purchasers in Mexico include some persons of Mexican origin or descent who reside in border cities in the United States, who purchase food items in corresponding Mexican border cities, and who carry these items back to the United States. [R. 64.]

The corporate defendant sent one communication to plaintiff and to plaintiff's brokers and wholesalers in the

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[1]Defendant-appellants are not attacking the sufficiency of the evidence to support the findings, as we believe clear-cut issues of law are raised by the findings, conclusions and injunction. For that reason, though there were conflicting affidavits before the trial court on many points [see R. 54-55], the affidavits, with one exception, were not made part of the Transcript of Record.

United States and Mexico that this defendant was the exclusive owner of the "Las Palmas" brand registered in Mexico and asserting an infringement by plaintiff.[2] [R. 64-65.]

All of defendants' acts were part of a plan to pirate plaintiff's good will for its "Las Palmas" products in Mexico. [R. 65.]

As a result of the defendants' acts, plaintiff's good will and reputation in the United States and Mexico have been damaged; purchasers in Mexico have been deceived into buying defendants' products as plaintiff's; and local, interstate and foreign commerce in plaintiff's products has been reduced. [R. 65-66.]

However, the following were also found to be true:

Plaintiff heretofore commenced proceedings in Mexico to cancel or nullify defendant Baca's registration under the Mexican law. These proceedings, still in process, ordinarily require in excess of one year, and defendant Baca has threatened to interfere with plaintiff's prosecution of these proceedings in Mexico. [R. 69.] In various particulars the laws of the Republic of Mexico recognize the rights of a prior user such as plaintiff in Mexico. [R. 66-68.][3]

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[2]This communication was false in that defendant Baca is the registered owner, not his joint venturer defendant Las Palmas Food Company, Inc.; the District Court also found this communication was not a legitimate warning to infringers but was sent in bad faith.

[3]See discussion, *infra*. Apart from reproducing pertinent extracts of the laws of the Republic of Mexico in its Findings [R. 66-68], the District Court did not construe the laws of the Republic of Mexico, though it concluded that an injunction issued by it would not contravene the public policy there set forth. [See Conclusion 9, R. 72.] The only evidence before the District Court on the laws of the Republic of Mexico were the extracts and the Affidavit of Juan del Avellano Ochoa. [R. 21.]

More important, all of defendants' operations of processing, canning and selling are accomplished in the Republic of Mexico, and none of them are accomplished by defendants in the United States. Finding 2 in part is:

> "Defendant Las Palmas Food Company, Inc., . . . is now engaged in packing and distributing such products in the Republic of Mexico." [R. 56.]

Finding 18 is in total as follows:

> "Since December, 1954, defendants have made *no sales in the United States* under any labels or packaging which included the words, name, or trade name 'Las Palmas' or 'Las Palmas Food Co., Inc.,' or any colorable imitation thereof; and *all sales* by defendants under labels or packaging bearing the trade-mark 'Las Palmas' have been made by defendants *in the Republic of Mexico* and none have been made in the United States; goods sold under such trade-mark by defendants have been packed *exclusively* in the Republic of Mexico." [R. 61.][4] (Emphasis added.)

Specification of Errors.

It is respectfully submitted that the District Court erred:

1. In granting plaintiff's motion for a preliminary injunction. This ruling was erroneous because:

(a) The action herein should have been dismissed on defendants' motion to dismiss, for the reason that said

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[4]Prior to November, 1954, and primarily in 1953, defendants had sold a small quantity of canned foods and condiments under the trade-mark "La Malinche" in the United States, under labels containing the corporate defendant's name, Las Palmas Food Company, Inc. This sale was not successful, was discontinued prior to commencement of this action, and is not the basis for the injunction herein. [See R. 61.]

Court did not have jurisdiction of the subject matter of the action and for the reason that the Amended Complaint failed to state a claim upon which said Court could grant relief;

(b) The acts enjoined are beyond the jurisdiction of the Court; and

(c) The policy of comity prevents said Court from issuing said injunction, from passing on the validity or effect of the acts of the authorities in Mexico in issuing a trade-mark to defendants' assignor, and from affecting the exercise of defendants' rights under said Mexican trade-mark.

2. In its Conclusion of Law 5 that "Defendants have competed unfairly with plaintiff *in the United States* . . . etc." [R. 71.] This conclusion is unsupported by the Finding of Fact.

3. In its Conclusion of Law 8 that the District Court had jurisdiction. [R. 71.] This conclusion is unsupported by the Findings of Fact and is erroneous for the reasons stated in (1) above.

4. In its Conclusion of Law 9 that an injunction restraining defendants from using their Mexican trade-mark in Mexico does not invalidate said registration, interfere with Mexican sovereignty, or contravene Mexican public policy. [R. 72.] This conclusion is unsupported by the Findings of Fact and is erroneous for the reasons stated in (1) above.

Summary of Argument.

The Specification of Errors shows that defendants' arguments may readily be reduced to two:

(1) The District Court has no jurisdiction over the subject matter of the action where the acts of the defendants are the use, exclusively in Mexico, of a trade-mark

registered in Mexico and owned by one of them. The Lanham Act has no extra-territorial application against acts valid under the trade-mark law of the foreign country where committed, especially where, as here, the foreign registration is owned by a foreign national.

(2) Even if jurisdiction of the subject matter were found to exist, the action turns on the validity or invalidity of defendants' Mexican trade-mark, and under principles of comity a United States court will not adjudicate such an action, especially where the foreign forum has already been appealed to by the parties.

We believe the questions are primarily governed by the following three cases:

Steele v. Bulova Watch Co., 344 U. S. 280, 97 L. Ed. 320 (1952);

Vanity Fair Mills, Inc. v. T. Eaton Co., 133 Fed. Supp. 522 (S. D. N. Y., 1955), aff'd 234 F. 2d 633 (2nd Cir., 1956), cert. den. 352 U. S. 871 (1956);

George W. Luft Co. v. Zande Cosmetic Co., 142 F. 2d 536 (2nd Cir., 1944), cert. den. 323 U. S. 756 (1944).

We include *Steele v. Bulova Watch Co., supra,* because it is the most important Supreme Court exposition. At inception, however, we point out that opinion expressly refused to rule on the precise factual situation here presented:

> "The question, therefore, whether a valid foreign registration would effect either the power to enjoin or the propriety of its exercise is not before us." (344 U. S. at 289.)

The *Luft* and *Vanity Fair* cases, *supra,* precisely support our position.

ARGUMENT.

I.

The Lanham Act Confers No Jurisdiction on a United States Court to Enjoin Sales Made Exclusively in Mexico Under a Trade-Mark Registered in Mexico to Defendants.

We refer the Court to Finding. 18 [R. 61, and reproduced above on p. 6.] All of defendants' operations of processing, canning and selling are accomplished in the Republic of Mexico, and none of them are accomplished in the United States. In the Republic of Mexico the defendants have a validly registered trade-mark. Indeed, the only evidence as to the effect of this trade-mark, apart from the face of some of the Mexican statutes, was the affidavit of an expert on Mexican law that defendant Baca, a Mexican national, had the *exclusive* right to the use of said trade-mark in Mexico. [R. 21-22.]

Upon such a record the cases are clear that the District Court has no jurisdiction over the subject matter and the complaint fails to state a claim upon which relief can be granted.

The question was examined at length by the Second Circuit in the recent case of *Vanity Fair Mills, Inc. v. T. Eaton Co. Ltd.,* 234 F. 2d 633, esp. at 640-644, cert. den. 352 U. S. 871 (1956). There the defendant was selling in Canada under a mark registered to it in Canada, goods produced in Canada. Facts showing a deliberate intent to trade on plaintiff's prior American trade-mark were alleged and were assumed to be true. Plaintiff argued that the *Bulova* case, *supra,* authorized the issuance of an injunction, but the Court stated:

> "We do not think that the Bulova case lends support to the plaintiff; to the contrary, we think that

> the rationale of the Court was so thoroughly based on the power of the United States to govern 'the conduct of *its own citizens* upon the high seas or even in foreign countries *when the rights of other nations or their nationals are not infringed,*' that the absence of one of the above factors might well be determinative and that the absence of both is certainly fatal. . . . We conclude that the remedies provided by the Lanham Act, other than in §44, should not be given an extra-territorial application against foreign citizens acting under presumably valid trademarks in a foreign country." (234 F. 2d at 642-643; emphasis in original.)

(As to Section 44, the Court concluded, 234 F. 2d at 644, that the benefits there provided are also "limited in application to within the United States.")

In the case at bar one of the defendants is a foreign national, to wit, defendant Baca, who is the owner of the Mexican registration, and the above language applies precisely to him. As to the other defendants (Worthington and Las Palmas Food Company, Inc.), the qualifications found in the *Bulova* case apply precisely to them. It is true that they are American citizens. But to govern in an American court by American law their conduct in Mexico will infringe the rights of Mexico and of Mexican nationals. (Baca, with whom they are in a joint venture in Mexico to exercise rights given by the Mexican trademark laws.)[5]

---

[5]As the Second Circuit also points out in the *Vanity Fair* case, *supra,* the result reached by the District Court here—extra-territorial application of American law—is contrary to usual conflict-of-laws principles. Second, the creation and extent of tort liability is gov-

The same result is required by the holding in *George W. Luft Co. v. Zande Cosmetic Co.,* 142 F. 2d 536 (2nd Cir., 1944), cert. den. 32 U. S. 756 (1944). There the Court held that the use of plaintiff's trade-mark as part of defendant's corporate name was not actionable, where, as here, defendant did not sell in the United States but only sold under its own valid foreign trade-mark in a foreign country. With reference to countries where the defendants had a valid trade-mark under the appropriate foreign law, the Court stated:

> "In countries falling within class (a) the defendants' use of the word 'Zande', either as a trademark *or as part of the corporate name* cannot constitute unfair competition with the plaintiff. Therefore they should not be restrained from doing business there *in their corporate* name or from using there the trademark 'Zande'. The next problem is whether equity should interfere with the defendant's activities in the United States which are exclusively concerned with

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erned, according to the usual rule, by the law of the place where the alleged tort was committed (*lex loci delicti*). The place of the wrong (*locus delicti*) is where the last event necessary to make an actor liable takes place. If the conduct complained of is fraudulent misrepresentation, the place of the wrong is not where the fraudulent statement was made, but where the plaintiff, as a result thereof, suffered a loss. Thus in cases of trademark infringement and unfair competition, the wrong takes place not where the deceptive labels are affixed to the goods or where the goods are wrapped in the misleading packages, but where the passing off occurs, *i.e.,* where the deceived customer buys the defendant's product in the belief that he is buying the plaintiff's. In this case, with the exception of defendant's few mail order sales into the United States, *the passing-off occurred in Canada, and hence under the usual rule would be governed by Canadian law.* (234 F. 2d at 639.)

In the case at bar, only the word "Mexico" need be substituted for the word "Canada" in the quotation above.

> such foreign markets. . . . We do not see upon what 'principles of equity' a court can enjoin the initiation of *acts in the United States which constitute no wrong to the plaintiff in the country where they are to be consummated.* Nor can we perceive upon what theory a plaintiff can recover damages for acts in the United States resulting in a sale of merchandise in a foreign country under a mark to which the defendant has established, over the plaintiff's opposition, a legal right of use in that country. Consequently neither the injunction or the accounting should cover activities of the defendant, either here or abroad, concerned with sales in countries where the defendants have established rights superior to the plaintiff's in the name 'Zande'." (142 F. 2d at 535-536; emphasis added.)

We believe all the pertinent cases are thoroughly reviewed in the *Vanity Fair* opinion, *supra,* to which the Court is respectfully referred. Among secondary authorities we call the Court's attention to:

> Annotation, 97 L. Ed. 328, "Extraterritorial protection of trade-mark or tradename acquired in the United States—federal cases."
>
> Note, Trademarks and Trade Names, 70 Harv. L. Rev. 743 (Feb. 1957).

See also the opinion of the District Court in the *Vanity Fair* case, 133 Fed. Supp. 522.

II.

Even if Jurisdiction Over the Subject Matter Were to Be Found, the District Court, Under the Doctrine of Comity, Should Not Enjoin an Act Where to Do so Impugns a Status Specifically Granted by Foreign Law.

The critical fact here is that defendants are operating in the Republic of Mexico under a validly issued trademark. Their acts under this registration in Mexico, in short, are not wrongful. Indeed, plaintiff recognizes that while the registration is extant, there is no wrong in Mexico, for plaintiff has instituted proceedings *in Mexico* in an attempt to have cancelled defendants' registration. [R. 69.]

This critical fact is not circumvented by the allegations that defendants are acting with improper purpose or are even attempting to prevent plaintiff's procedure in Mexico. Defendants' status in Mexico to use the Mexican trademark "Las Palmas" should be determined by the proper Mexican authorities, and not by our courts, and until cancellation by the proper Mexican authorities our courts should not do by indirection what they will not do directly; that is, our courts should not impinge upon or nullify a status created by and exercised wholly in a foreign jurisdiction. Defendants' acts being wholly lawful where committed, and plaintiff's position depending wholly upon the invalidity of an extant foreign registration, our courts, under the principle of comity, will not interfere.

Again the reasoning and authorities for our argument are most recently and exhaustively collected in the opinion

in the *Vanity Fair* case by the Second Circuit. After first discussing the doctrine of "forum non conveniens" that Court states:

> "We are convinced that the balance of convenience is strongly in favor of defendant, but it is unnecessary for the following reasons for us to rely solely on that ground.
>
> "The crucial issue in this case is the validity of defendant's Canadian trademark registration under Canadian trademark law. The Canadian Registrar of Trademarks has registered the mark 'Vanity Fair' in defendant's name and has refused registration of plaintiff's 'Vanity Fair' mark on the ground that it interfered with defendant's prior registration. Sections 6 and 19 of the Canadian Trademark Act of 1952 give the Canadian registrant of a trademark the statutory right to prevent the use in Canada of a confusing mark, unless the Canadian registration is shown to be invalid. Such a showing could be made in any Canadian court of competent jurisdiction as a defense to an infringement action brought by defendant, or plaintiff could initiate proceedings in the Exchequer Court of Canada to expunge or amend defendant's registration. §§18 and 56. The Exchequer Court is given exclusive jurisdiction by §56 to expunge or amend a trademark registration. Under these circumstances, *we do not think a United States district court should take jurisdiction over that portion of this action turning on the validity or invalidity of defendant's Canadian trademark.*
>
> "In the first place, courts of one state are reluctant to impose liability upon a person who acts pursuant to a privilege conferred by the law of the place where the acts occurred. Restatement, Conflict of Laws §382(2); Goodrich, Conflict of Laws §94 (1939). In the second place, it is well-established that

the courts of one state will not determine the validity of the acts of a foreign sovereign done within its borders. Underhill v. Hernandez, 1897, 168 U.S. 250; American Banana Co. v. United Fruit Co., 1909, 213 U.S. 347; Ricaud v. American Metal Co., 1918, 246 U.S. 304; Banco de Espana v. Federal Reserve Bank, 2 Cir., 1940, 114 F. 2d 438; Bernstein v. Van Heyghen Freres Societe Anonyme, 2 Cir. 1947, 163 F. 2d 246, cert. denied 332 U.S. 772; Pasos v. Pan American Airways, 2 Cir., 1956, 229 F. 2d 271. *These precedents have not involved the acts or trademark official of foreign countries, but their rationale would appear to extend to that situation.* Moreover, in George W. Luft v. Zande Cosmetic Co., 2 Cir. 1944, 142 F. 2d 536, 61 USPQ 424, cert. denied 323 U. S. 756, 63 USPQ 358, we assumed the validity of foreign trademark registrations in holding that the lower court could not enjoin an American manufacturer from labeling his product with an infringing mark in the United States for shipment to foreign countries in which he had a presumably valid registered trademark. 'We do not see upon what "principle of equity" a court can enjoin the initiation of acts in the United States which constitute no wrong to the plaintiff in the country where they are to be consummated. Nor can we perceive upon what theory a plaintiff can recover damages for acts in the United States resulting in a sale of merchandise in a foreign country under a mark to which the defendant has established, over the plaintiff's opposition, a legal right of use in that country. Consequently, neither the injunction nor the accounting should cover activities of the defendants, either here or abroad, concerned with sales in countries where the defendants have established rights superior to the plaintiff's in the name "Zande."' 142 F. 2d at 540, 61 USPQ at 429.

"Were this merely a transitory tort action in which disputed facts could be litigated as conveniently here as in Canada, we would think the jurisdiction of the district court should be exercised. *But we do not think it the province of United States district courts to determine the validity of trademarks which officials of foreign countries have seen fit to grant.* To do so would be to welcome conflicts with the administrative and judicial officers of the Dominion of Canada. We realize that a court of equity having personal jurisdiction over a party has power to enjoin him from committing acts elsewhere. But this power should be exercised with great reluctance when it will be difficult to secure compliance with any resulting decree or when the exercise of such power is fraught with possibilities of discord and conflict with the authorities of another country." (234 F. 2d at 446-447; emphasis added; footnotes omitted.)

The cases cited in the above quotation fully support our position that despite the allegations of improper purpose and prevention of plaintiff's efforts to cancel (which defendants denied below), it must be assumed that the issuance of the Mexican registration and its continued existence or non-cancellation are lawful. As Justice Holmes said in the *American Banana Co.* case:

"The fundamental reason why persuading a sovereign power to do this or that cannot be a tort is not that the sovereign cannot be joined as a defendant or because it must be assumed to be acting lawfully. The intervention of parties who had a right knowingly to produce the harmful result between the defendant and the harm has been thought to be a nonconductor and to bar responsibility, Allen v. Flood (1898), A. C. 1, 121, 151, etc., but it is not clear that this is always true, for instance, in the case of

the privileged repetition of a slander, Elmer v. Fessenden, 151 Massachusetts, 359, 362, 363, or the malicious and unjustified persuasion to discharge from employment. Moran v. Dunphy, 177 Massachusetts, 485, 487. The fundamental reason is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts can not admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law." (213 U. S. 347, 358.)

(Compare *United States v. Watkins,* 159 F. 2d 650, 652, 2 Cir. 1947. Similarly, if plaintiff is successful in Mexico in causing cancellation of defendants' Mexican trademark, defendants would have to accept such cancellation as lawful and final regardless of the methods used by plaintiff to effect the cancellation. See *United States v. Watkins,* 159 F. 2d 50, 51, 2 Cir., 1947.)

See also Note, Trademarks and Trade Names, 70 Harv. L. Rev. 743 (Feb. 1957).

Conclusion.

For the reasons given in this brief, each of which is sufficient in itself, defendants-appellants pray that the order and injunction appealed from be reversed and that this Court direct a dismissal of the within action.

Respectfully submitted,

MASON & HOWARD, and
PAUL P. SELVIN,
Attorneys for Defendants.

No. 15306

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LAS PALMAS FOOD COMPANY, INC., a corporation, PABLO BACA GAVALDON, and RALPH WORTHINGTON,

Appellants,

vs.

RAMIREZ & FERAUD CHILI CO., a copartnership composed of FRANK FERAUD and E. C. FERAUD,

Appellee.

APPELLEE'S BRIEF.

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Appellee.

APPELLEE'S BRIEF.

Introduction.

This is the answer of plaintiff-appellee, Ramirez & Feraud Chili Co., to the opening brief for defendants-appellants in their appeal from the order of the District Court, entered July 27, 1956, denying defendants' motion to dismiss and granting plaintiff's motion for preliminary injunction, and from the preliminary injunction dated July 30, 1956, issued thereon.

The facts are not in dispute here. On the contrary, appellants cynically admit the damning facts found by the District Court. Appellants merely attempt to escape the fatal consequences of their illegal acts by arguing a highly technical point of law.

The opinion of the Trial Court resolving these issues of law is reported at 146 Fed. Supp. 594; 111 U. S. P. Q. 296. This opinion was rendered on November 8, 1956, after the transcript of the record was forwarded to this Court and is not therefore included in the printed record.

Counterstatement of the Case.

The "Concise Statement of the Case" and "Detailed Statement of the Case" in the opening brief for appellants set forth certain of the relevant facts found by the District Court. Appellants have, however, omitted mention of various points which bear on the questions of law raised on this appeal. The following statement is made in an effort to present to the Court a more complete story and to supplement appellants' exposition.

This is an action for trademark infringement and unfair competition, with jurisdiction asserted under the Trademark Act of 1946 (Lanham Act, 15 U. S. C. 1051-1127) and under 28 U. S. C. 1338(b) [Finding 5, Tr. p. 57].

Appellee, Ramirez & Feraud Chili Co., has, since 1922, continuously employed the trademark "LAS PALMAS" in commerce in the United States for various canned Spanish foods and condiments and, since 1948, in the Republic of Mexico and in foreign commerce between the United States and Mexico [Findings 6 and 7, Tr. pp. 57-58]. The mark is registered for such goods in the United States Patent Office, both with and apart from accompanying design features, under the Trademark Act of 1946, Registration No. 379,295, issued July 9, 1940, and No. 582,054, issued November 3, 1953 [Findings 9 and 10, Tr. pp. 58-59].

Appellee's "Las Palmas" foods have been advertised for the past thirty (30) years in the United States and for the past five (5) years in Mexico. Sales have been extensive in both countries under the mark, and appellee has developed a valuable good will associated with its "Las Palmas" brand and with its label, both in the United States and in Mexico [Findings 11-13, incl., Tr. p. 59].

Appellant Las Palmas Food Company, Inc., was incorporated in California in 1953 by present counsel for appellant Worthington, the latter being a United States citizen, resident within the County of Los Angeles, California, and the President of appellant corporation [Findings 2, 4, 14, Tr. pp. 56, 57, 59-60]. The name of this corporation was chosen by appellant Worthington with full knowledge of appellee's "Las Palmas" trademark and with intent to trade on its good will [Finding 15, Tr. p. 60].

Appellant Baca, a citizen of Mexico, also domiciled in Los Angeles County, California, became associated with appellant Worthington and Las Palmas Food Company, Inc., in 1953 in a joint venture. Appellant Baca, who had previously been engaged in the food business in the United States for some thirty (30) years and was a former customer of appellee, had knowledge at the time of this association of appellee's prior use of its mark and the good will associated therewith [Findings 3, 16-17, 20, Tr. pp. 56-57, 60-61, 62].

The purpose and plan of such joint venture was for the appellants to make and sell food products under the "Las Palmas" trademark or trade name in the United States and in Mexico [Finding 16, Tr. p. 60].

Later in 1953 an application was filed in Mexico by one Fernando De La Pena of Tijuana, Baja California, to register the mark "LAS PALMAS" in the Republic of Mexico for chili sauce and spice. This registration, which issued in February, 1954, was assigned to appellant Baca on November 30, 1954 [Finding 19, Tr. pp. 61-62]. La Pena is a stranger to this action and, so far as appears from the evidence, was a complete stranger to appellants' unlawful activities. Appellants' Opening Brief (p. 3), however, candidly admits that Baca acquired this trademark registration to trade on appellee's established trademark rights.

The sale of the products bearing the Las Palmas Food Company trade name was discontinued in the United States in late 1954 by the joint venturers, but, early in 1955, appellants, using appellee's label as a model, caused to be printed in California counterfeit "LAS PALMAS" labels for red chili sauce, using not only the identical trademark "LAS PALMAS" but the exact colors of appellee's label and same format, style of printing, and a similar layout and design [Findings 18, 21, Tr. pp. 61, 62]. In addition to securing these counterfeit labels in the United States, appellants obtained cans and cartons here for use in a processing and packing operation thereafter carried on at Tecate, Baja California [Finding 22, Tr. pp. 62-63].

Subsequently, in 1955 appellants commenced to pack and sell in Mexico, and particularly in Tijuana, Baja California, where appellee's product was widely sold, the spurious "LAS PALMAS" red chili sauce in cans identical to appellee's and bearing the counterfeit labels [Finding 23, Tr. p. 63].

The copying of appellee's trademark and label was with full knowledge by all the appellants of the good will associated with the appellee's mark and was done for the purpose of palming off in Mexico the appellants' product as that of appellee [Finding 25, Tr. p. 63].

The packaging and dress of the goods of the parties are so alike in over-all appearance that confusion among purchasers appears inevitable [Finding 24, Tr. p. 63]. Moreover, as stated by the Trial Court (opinion, 146 Fed. Supp. at 599), appellants' products "are produced and canned in Mexico under comparatively unsanitary conditions, and are inferior in quality to plaintiff's [appellee's] products."

Since United States residents or citizens residing in United States border cities purchase in Mexico many grocery and food items and freely carry them back to this country for consumption, there is a substantial likelihood of confusion among such purchasers, who may by mistake buy appellants' spurious product in Mexico, and appellee's good will in the United States is thereby placed in jeopardy [Finding 26, Tr. p. 64].

In order to harass appellee and coerce its wholesalers and brokers from shipping into Mexico the genuine "Las Palmas" product of appellee, appellant Las Palmas Food Company, Inc., addressed a communication to appellee and each of its brokers and wholesalers selling in Mexico, alleging ownership of the Mexican registration of "Las Palmas" and asserting an infringement by virtue of any exportation to Mexico of appellee's "Las Palmas" products. This communication was false and was not sent out as a legitimate warning to infringers [Findings 27, 28, Tr. pp. 64-65].

All of these acts of appellants in the United States and in Mexico were done by the joint venturers pursuant to a plan having for its objective the pirating of appellee's market and good will in Mexico for its "LAS PALMAS" products [Finding 29, Tr. p. 65].

These activities have resulted in the appropriation of appellee's Mexican market and jeopardy to appellee's market in the United States; appellee's reputation and good will among its wholesalers and distributors in the United States and Mexico have suffered; shipments of "LAS PALMAS" products by appellee to its wholesalers and brokers for resale in Mexico have diminished; and such brokers and wholesalers have ceased or diminished their shipments into Mexico. Both interstate and foreign commerce in these goods has been drastically reduced [Finding 30, Tr. pp. 65-66].

Appellee has actually commenced proceedings in Mexico under Mexican law to effect nullification of the Mexican registration of appellants. This law recognizes the rights of a prior user in Mexico by providing that the right to the use of a mark obtained by virtue of its registration shall be ineffectual against third parties who, as in the case of appellee, have been using the mark for more than three years prior to the date of registration [Findings 31, 33, 34, Tr. pp. 66-67, 68, 69]. Such nullification proceedings, which may be based on prior use or on a showing of the registrant's intent to defraud, ordinarily require in excess of a year's time before a final decision is reached [Findings 32, 35, Tr. pp. 67-68, 69]. Meanwhile appellant Baca has threatened to delay these proceedings in Mexico [Finding 36, Tr. p. 69], and appellee is suffering irreparable injury [Finding 38, Tr. p. 70].

To preserve the *status quo* of this action pending the Court's determination of appellee's right to interlocutory relief, the District Court heretofore temporarily restrained appellants from transferring the Mexican registration of "LAS PALMAS" and that portion of the business and certain physical assets used therein [Finding 37, Tr. pp. 69-70], and this restraining order has been carried into the temporary injunction [Tr. pp. 80-81].

Said temporary injunction also generally precludes appellants from using the trademark "LAS PALMAS" or any colorable imitation thereof for red chili sauce or other Spanish-type foods or condiments either in the United States or the Republic of Mexico; from interfering with appellee's efforts to gather evidence in Mexico relative to its use of its mark; and from representing to others that the exportation to or sale in Mexico of appellee's "LAS PALMAS" products infringes on appellants' rights [Tr. pp. 77-78].

Summary of Argument.

Although appellants have specified a number of errors in their brief (pp. 6-7), including alleged errors in Conclusions of Law 5 and 9, no argument is specifically addressed to these points. Appellee's counterargument is therefore limited herein to the following propositions:

1. The District Court has jurisdiction under the Lanham Act to enjoin these appellants from engaging in trademark infringement and unfair competition in Mexico.

2. The District Court is not debarred under the doctrine of comity from exercising its jurisdiction.

ARGUMENT.

The District Court Has Jurisdiction Under the Lanham Act to Enjoin These Appellants From Engaging in Trademark Infringement and Unfair Competition in Mexico.

The attack of the appellants on the temporary injunction is predicated on the argument that the Court is without jurisdiction to enjoin the activities abroad of citizens of foreign countries where such parties are acting pursuant to a right conferred by the foreign sovereign (Appellants' Br. pp. 10-12).

This argument does not, however, meet the issue of this appeal, since:

(a) Two of the three joint venturers, over whom the Court has *in personam* jurisdiction, are United States citizens, and the third, appellant Baca, is domiciled here.

(b) The appellants' acts *in the United States,* which constituted part of the over-all plan or scheme to counterfeit appellee's trademark in the foreign jurisdiction, were in and of themselves unlawful.

(c) The acts of the appellants in Mexico caused injury in the United States, having an adverse effect on commerce which Congress may lawfully regulate.

(d) The appellants' conspiracy was planned in and has been directed from California.

As in *Steele v. Bulova Watch Co.,* 344 U. S. 280, 97 L. Ed. 319, jurisdiction in the instant case was invoked under the Lanham Act. It was clearly the intent of Congress under this Act to control all commerce which may be lawfully regulated by Congress to the limits of authority constitutionally delegated (15 U. S. C. 1127, definitions

of "Commerce" and "Intent of Act"; *Steele v. Bulova Watch Co., supra,* 344 U. S. at 287, 97 L. Ed. at 325). To effectuate this intent, Congress in the Lanham Act conferred such jurisdiction on the District Court (15 U. S. C. 1121).

Even prior to the Lanham Act and as early as 1907, our Courts had granted relief for trademark infringement and unfair competition occurring in foreign countries when the Court had jurisdiction over the person of the defendant and the acts abroad had repercussions here.

See: *Vacuum Oil Co. v. Eagle Oil Co.,* 154 Fed. 867 (C. C., N. J. 1907), affirmed 162 Fed. 671, cert. den. 214 U. S. 515; also *Morris v. Altstedter,* 93 Misc. 329, 156 N. Y. Supp. 1103 (1916), affirmed 173 App. Div. 932, 158 N. Y. Supp. 1123 (1916); *Hecker H-O Co. v. Holland Food Corp.,* 36 F. 2d 767 (C. C. A. 2, 1929).

Thus in the *Vacuum Oil Co.* case, *supra,* the Circuit Court stated in enjoining the use of defendant's trademark abroad (p. 874):

> "The purchase and shipment of this oil for the purpose of selling it under false representations, and the sale of it under false representations and tradenames abroad in unfair competition with the complainant, was a single business, and each step in the transaction was part of a single fraudulent scheme, which, under the circumstances detailed, must be deemed the act of the defendants. *This unfair competition has inflicted injury upon the complainant's business in this country by diminishing or tending to diminish, its foreign trade.*" (Emphasis added.)

The Lanham Act did not narrow the Court's jurisdiction to act in such circumstances. As stated in *Steele v. Bulova Watch Co., supra,* 344 U. S. at 287, 97 L. Ed. at 325:

> "that Act's sweeping reach into 'all commerce which may be lawfully regulated by Congress' does not constrict prior law or deprive courts of jurisdiction previously exercised."

In the exercise of the power thus confirmed under the Lanham Act, the District Court is not barred by any rule of international law from governing the acts of United States citizens and residents which are carried out wholly within the foreign country.

As put by Mr. Chief Justice Hughes in *Blackmer v. United States,* 284 U. S. 421, 437, 76 L. Ed. 375, 382:

> "While the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its application, so far as citizens of the United States in foreign countries are concerned, is one of construction, not of legislative power."

So in the instant case, as in *Steele v. Bulova Watch Co., supra,* we may start with the initial premise that the District Court, exercising the congressional purpose expressed in the Lanham Act, has jurisdiction to enjoin acts of trademark infringement and unfair competition committed in a foreign country by United States citizens and residents, where such acts affect commerce within the control of Congress.

Appellants argue, however, (Brief, p. 10), that, since appellant Baca is a citizen of the Republic of Mexico, the Court is debarred from exercising jurisdiction over

acts of the appellants committed outside the United States, particularly in that Baca is the owner of a Mexican trademark registration covering the infringing mark. Appellants do not even attempt to justify the plainly illegal activities of either Las Palmas Food Company, Inc. or Worthington. They merely try to hide behind their confederate Baca.

True it is that Baca is a citizen of the Republic of Mexico. He is, however, a resident of the United States, domiciled at Monterey Park, Los Angeles County, California, and therefore equally subject to the Court's jurisdiction as any United States citizen.

In *United States v. Stabler,* 169 F. 2d 995 (C. C. A. 3, 1948), the Court stated (p. 997):

> "A person who is domiciled within a country and a citizen thereof is, of course, subject to the jurisdiction of its courts wherever he may be since both domicile and national allegiance are recognized bases of jurisdiction over a person. Blackmer v. United States, 1932, 284 U. S. 421, 52 S. Ct. 252, 76 L. Ed. 375; Milliken v. Meyer, 1940, 311 U. S. 457, 61 S. Ct. 339, 85 L. Ed. 278, 132 A. L. R. 1357; see Restatement, Conflict of Laws, § 47 (1934)."

The rationale of this doctrine has been succinctly stated by the Supreme Court in *Milliken v. Meyer, supra,* 311 U. S. at 463, 85 L. Ed. at 283:

> "The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties."

This is particularly true of appellant Baca, who not only resides within this jurisdiction, but has been engaged in the food business in the United States for the last

thirty (30) years. After enjoying the privileges and protection of the United States for so long a period, appellant Baca cannot now defeat the responsibilities imposed by the United States upon its own citizens. To hold otherwise would create among us a privileged group not amenable to our law nor responsible for such conduct here and abroad as may result in damage in this country.

Appellants in their argument further lose sight of the fact that various acts of unfair competition committed by the appellants *in the United States* as part and parcel of the over-all scheme to counterfeit appellee's mark in Mexico were in and of themselves illegal.

The name of appellant Las Palmas Food Company, Inc. was chosen with the purpose of incorporating said appellant *in California* to trade on appellee's good will, and the offending labels were caused to be counterfeited here with the intent to palm off the spurious product of appellants as that of appellee [Findings 21, 25, Tr. pp. 62-63]. These latter findings of the Court actually spell out a criminal act in the State of California under Section 14321 of the Business and Professions Code:

> "§ 14321. Same. Grade of offenses. Every person who wilfully forges or counterfeits, or procures to be forged or counterfeited, a trade-mark registered with the Secretary of State or the Commissioner of Patents in the United States Patent Office . . . with intent to pass off or assist any other person to pass off any goods to which the trade-mark is attached or applied as those of the registrant is guilty of a misdemeanor."

Appellants' unfair competition in the United States also included the false communication by appellant Las Palmas Food Company, Inc. to appellee's brokers and

wholesalers in the United States and Mexico, which was sent out in bad faith with the purpose of injuring appellee's reputation, and not as a legitimate warning. Moreover, the sale of the counterfeit product in the border cities of Mexico, where it is bought by United States citizens and freely carried back into the United States for consumption, created a likelihood of confusion here and placed appellee's good will in this country in jeopardy.

Thus the District Court, in Conclusion of Law 5 [Tr. p. 71], which is not attacked in appellees' brief, stated:

> "5. Defendants [appellants] have competed unfairly with plaintiff [appellee] *in the United States* in pursuance of said unlawful plan or scheme of defendants to appropriate the plaintiff's established market and good will in the Republic of Mexico." (Emphasis added.)

In *Steele v. Bulova Watch Co., supra,* the Court found federal jurisdiction of the subject matter, even though the acts in the United States pursuant to the defendants' over-all plan or scheme to compete unfairly in Mexico "when viewed in isolation do not violate any of our laws" (344 U. S. at 287; 97 L. Ed. at 325), since such acts constituted "trade practices which radiate unlawful consequences here" (344 U. S. at 288, 97 L. Ed. at 326).

So in the present case the Court found "both local and interstate commerce in plaintiff's said goods in the United States have been diminished, and its commerce in said goods between the United States and the Republic of Mexico, as well as that of certain of its wholesalers and distributors, has been drastically reduced." [Finding 30, Tr. pp. 65-66.]

But, by contrast with the *Bulova* case, we have here an even stronger basis of jurisdiction under the Lanham Act.

In the case at bar the facts establish unfair competition in the United States in the course of appellants' over-all scheme to pirate the appellee's good will in Mexico, such illegal acts in the United States culminating in the counterfeiting in Mexico which has adversely affected that Commerce which Congress has sought to regulate through the jurisdiction of the District Court. Whereas, in *Bulova* the Supreme Court went to some length to establish the proposition that the requisite jurisdiction existed, despite the absence of acts illegal *per se* in this country, the case at bar is not beset with any such actual deficiencies and falls squarely within the established jurisdiction of the Court to enjoin the acts of United States citizens and residents abroad which bring about the forbidden effect on United States commerce.

The District Court Is Not Debarred Under the Doctrine of Comity From Exercising Its Jurisdiction.

Appellants argue that, irrespective of the jurisdiction of the District Court over the subject matter, the acquisition by appellant Baca of the registration in Mexico of the counterfeit "LAS PALMAS" mark, should, under the doctrine of comity, preclude the District Court from acting to "impinge upon or nullify a status created by and exercised wholly in a foreign jurisdiction" (Brief, p. 13).

It is believed that, under this argument, the appellants have reached the crux of this controversy, since this is the question that the Supreme Court did not undertake to determine in the *Bulova* case, *supra*. However, the point was urged and determined adversely to appellants' position here, in the Court of Appeals in *Bulova Watch Co. v. Steele,* 194 F. 2d 567 (C. C. A. 5, 1952).

To review the facts of that case, the defendant Steele, who was a United States citizen and a resident of Texas, assembled and sold watches *in Mexico* stamped with the plaintiff's trademark "Bulova." After determining that the "Bulova" mark was not registered in Mexico, Steele secured registration thereof in that country. It also appeared from the record that the defendant had the various watch parts shipped to Mexico either from Switzerland or from the United States.

When the Bulova Watch Co. received numerous complaints about the sale of spurious "Bulova" watches, the company instituted nullification proceedings in Mexico to cancel the Mexican registration of Steele. It likewise brought suit in the District Court against Steele at the place of his United States domicile, seeking an injunction to preclude him from using the mark "Bulova" *in Mexico.*

As of the date of the decision of the Court of Appeals, the Bulova Watch Co. had failed in its efforts in the Mexican courts to secure cancellation of defendant's Mexican registration.

Nevertheless, the Court of Appeals determined that it had the requisite jurisdiction, under the Lanham Trademark Act of 1946, to enjoin the unfair competition in Mexico, further indicating that the Mexican registration of the defendant did not oust it from such jurisdiction:

> "It could not be contended that Steele's Mexican Trade Mark placed upon him any duty to use the name 'Bulova.' The Republic of Mexico was not interested in his exercise of the privilege purportedly granted. *For the United States to exercise its jurisdiction over one of its own nationals involves no conflict with the sovereignty of the Republic of Mexico."* (P. 571.) (Emphasis added.)

In affirming this decision, the Supreme Court in *Steele v. Bulova Watch Co., supra,* noted that Steele's Mexican registration had now been cancelled by the Mexican court and that "there is thus no conflict which might afford petitioner a *pretext* that such relief would impugn foreign law" (344 U. S. at 289, 97 L. Ed. at 326). (Emphasis added.)

In so characterizing the infringer's argument, albeit moot, the Supreme Court rather effectively indicated that it did not regard the same as having much merit, and, had the Mexican registration still been extant, its decision would not have differed. This is further indicated by the authorities cited with approval in this Supreme Court decision, both in the field of trademarks and apart therefrom.

Thus appellants quote in their brief (pp. 16-17) the decision of Justice Holmes in *American Banana Co. v. United Fruit Co.,* 213 U. S. 347, 53 L. Ed. 826 (1909). This noted case is, however, clearly limited by the Supreme Court in *Bulova* to the proposition that "a violation of American laws could not be grounded on a foreign nation's sovereign acts" (344 U. S. at 288, 97 L. Ed. at 326).

In the case at bar, as in *Bulova,* appellee neither sought, nor did the District Court determine that any act of the Republic of Mexico was unlawful. The United States Court is not asked to find that the Mexican registration is invalid, nor is such a determination necessary as a prerequisite to the protection of United States Commerce. And there can be no affront to the sovereignty of the Mexican government by a determination of the United States Court that its citizens or residents may not use the

license or permission granted under Mexican law in such manner so as to create unlawful effects in this country (*United States v. Sisal Sales Corp.*, 274 U. S. 268, 71 L. Ed. 1042 (1927).)

In comparing this later decision with the *Banana* case, *supra,* the Supreme Court in *Bulova* emphasizes this distinction at 344 U. S. 288, 97 L. Ed. 326:

> ". . . Viewed in its context, the holding in that case [American Banana Co. v. United Fruit Co., *supra*] was not meant to confer blanket immunity on trade practices *which radiate unlawful consequences here,* merely because they were initiated or consummated outside the territorial limits of the United States. Unlawful effects in this country, absent in the posture of the Banana Case before us, are often decisive; this Court held as much in Thomsen v. Cayser, 243 U. S. 66, 61 L. Ed. 597, 37 S. Ct. 353, Ann. Cas. 1917D 322 (1917), and United States v. Sisal Sales Corp., 274 U. S. 268, 71 L. Ed. 1042, 47 S. Ct. 592 (1927). As in Sisal, *the crux of the complaint here is 'not merely of something done by another government at the instigation of private parties'; petitioner by his 'own deliberate acts, here and elsewhere . . . brought about forbidden results within the United States.'*" (Emphasis added.)

It must be pointed out that in *Bulova* the record showed no priority of actual trademark use in Mexico of the "Bulova" mark by the Bulova Watch Co., while in the instant case such priority of use in that country for more than three years before the issuance of the Mexican registration is established [Finding 33, Tr. p. 68].

Under these facts the Mexican law provides that "The right to the use of a trademark obtained by virtue of its

registration shall be ineffectual . . ." against the prior user [Finding 31, Tr. p. 66].

So a stronger case in favor of the exercise of the Court's jurisdiction is found here than was presented to the Fifth Circuit Court of Appeals in *Bulova*. Here there can be no question of a violation of Mexican sovereignty, since the license or permission granted by Mexico is rendered ineffectual against appellee under that sovereign's own law.

Nor does the decision of the Second Circuit in *Vanity Fair Mills, Inc. v. T. Eaton Co., Limited,* 234 F. 2d 633 (C. C. A. 2, 1956), cert. den. 352 U. S. 871, I L. Ed. 2d 76 (1956), lend support to appellants' argument, despite substantial reliance thereon in this appeal (Brief, pp. 9, 14). In that case Judge Waterman, after carefully analyzing the Supreme Court decision in *Steele v. Bulova Watch Co., supra,* indicated that three basic factors were there present:

> ". . . (1) the defendant's conduct had a substantial effect on United States commerce; (2) the defendant was a United States citizen and the United States has a broad power to regulate the conduct of its citizens in foreign countries; and (3) there was no conflict with trade-mark rights established under the foreign law, since the defendant's Mexican registration had been canceled by proceedings in Mexico. Only the first factor is present in this case." (P. 642.)

In the case at bar, even if we accept the analysis of the Second Circuit, factors designated (1) and (2) are

present, and the Court of Appeals of the Second Circuit specifically declined to decide the issue in such circumstances, noting by footnote 14:

> "At the time the Fifth Circuit decided the Bulova case, 194 F. 2d 567, the defendant's Mexican registration had not been canceled. Since the Fifth Circuit assumed that the defendant had a valid Mexican registration, it thought the presence or absence of a foreign trade-mark was not a determinative factor. *Cf.* George W. Luft Co. v. Zande Cosmetic Co., 2 Cir., 1944, 142 F. 2d 536. *We need not decide that question because of the additional fact that the defendant here is not an American citizen.*" (P. 643.) (Emphasis added.)

Important factual distinctions exist between the *Vanity Fair* case and the present action. The defendants in the former were a Canadian corporation and its Canadian officers, who resided in Canada. Defendant corporation had registered its mark in Canada in 1915, prior to plaintiff's initial use in Canada in 1917, and plaintiff's application for registration in Canada was denied in 1919, based upon the defendants' registration. Hence in the *Vanity Fair* case, the plaintiff, who was the later user in Canada, could only satisfy the first of the three factors set out by the Court. The Court felt that in the absence of *both* of the other two factors present in the *Bulova* case, it could not act. It did *not* hold that a valid registration alone in Canada would so preclude it.

Finally, it is seen that in this case there is no conflict with trademark rights established under foreign law, since the Mexican registration is permissive and appellee's rights in the "LAS PALMAS" trademark are not subordinate to those of appellants under Mexican law. Unlike the

Vanity Fair case, there has been no administrative proceeding in Mexico affirming appellants' rights to use or register as against appellee herein. The Court's injunction here would not therefore in effect reverse any decision of the Mexican authorities, as might have been the result in the *Vanity Fair* case. It does not violate Mexican law.

Appellants also rely upon the case of *George W. Luft Co. v. Zande Cosmetic Co.,* 142 F. 2d 536 (C. C. A. 2, 1944), cert. den. 323 U. S. 756.

In that case plaintiff's and defendant's marks were not identical, being *"Tangee"* and *"Zande,"* respectively. Competition existed between plaintiff and defendant not only in one foreign nation, but in a large number of countries, and *in some of them plaintiff was not the prior user of the mark. In some of the countries opposition and/or cancellation proceedings between plaintiff and defendant as to trademark registration had been decided in favor of defendant.* Only with respect to defendant's operations in such countries, placed in classification (a) by the Court, did the Court refuse to enjoin defendant's infringement. *With respect to countries denoted as class (b), wherein plaintiff and defendant were doing business, and defendant had not established a right to use the mark superior to the right of plaintiff, as in the present action, the Court held it had jurisdiction to control the defendant's trademark activities in various foreign countries.*

Thus the *Zande* case is cited by the Supreme Court in *Bulova* as authority for the proposition that the Courts have, even prior to the broadened commerce provisions of the Lanham Act, exercised their jurisdiction to enjoin trademark infringement in a foreign country.

In short, none of the authorities cited by appellants denies the jurisdiction and power of the Court to enjoin acts in a foreign jurisdiction of United States citizens or residents before the Court, where, as in the instant case, these acts adversely affect commerce in the United States, except in those circumstances where defendant is the earlier user in the foreign country and whose right to register the mark has been determined by the foreign jurisdiction to be superior to that of plaintiff. Present the other facts mentioned, mere registration in the foreign jurisdiction by the infringer does not, as pointed out by the Court of Appeals in *Bulova,* constitute a valid pretext for evading our laws.

Conclusion.

This is a simple case in which the appellant corporation and the appellant Worthington, both citizens of and domiciled in California, conspired in the United States to steal appellee's established "LAS PALMAS" trademark and the good will thereof in the United States and Mexico.

In this conspiracy they enlisted the services of their confederate, appellant Baca, a Mexican citizen, also domiciled in California.

Pursuant to this conspiracy formulated in California, the appellants, in a joint venture, deliberately carried out their plans in both the United States and Mexico to the injury of appellee.

Appellant Baca later acquired a Mexican trademark registration with the express intent of using it as a cloak, for himself and the other appellants, to trade on appellee's established trademark rights.

This Court should not permit these unscrupulous appellants to use equity as an instrument of inequity, and the order of the District Court enjoining these appellants from a continuance of their illegal acts should be affirmed.

Dated: At Los Angeles, California, this 30th day of April, 1957.

Respectfully submitted,

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No. 15306

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LAS PALMAS FOOD COMPANY, INC., a corporation; PABLO BACA GAVALDON and RALPH WORTHINGTON,

Appellants,

vs.

RAMIREZ & FERAUD CHILI CO., a co-partnership composed of Frand Feraud and E. C. Feraud,

Appellee.

APPELLANTS' REPLY BRIEF.

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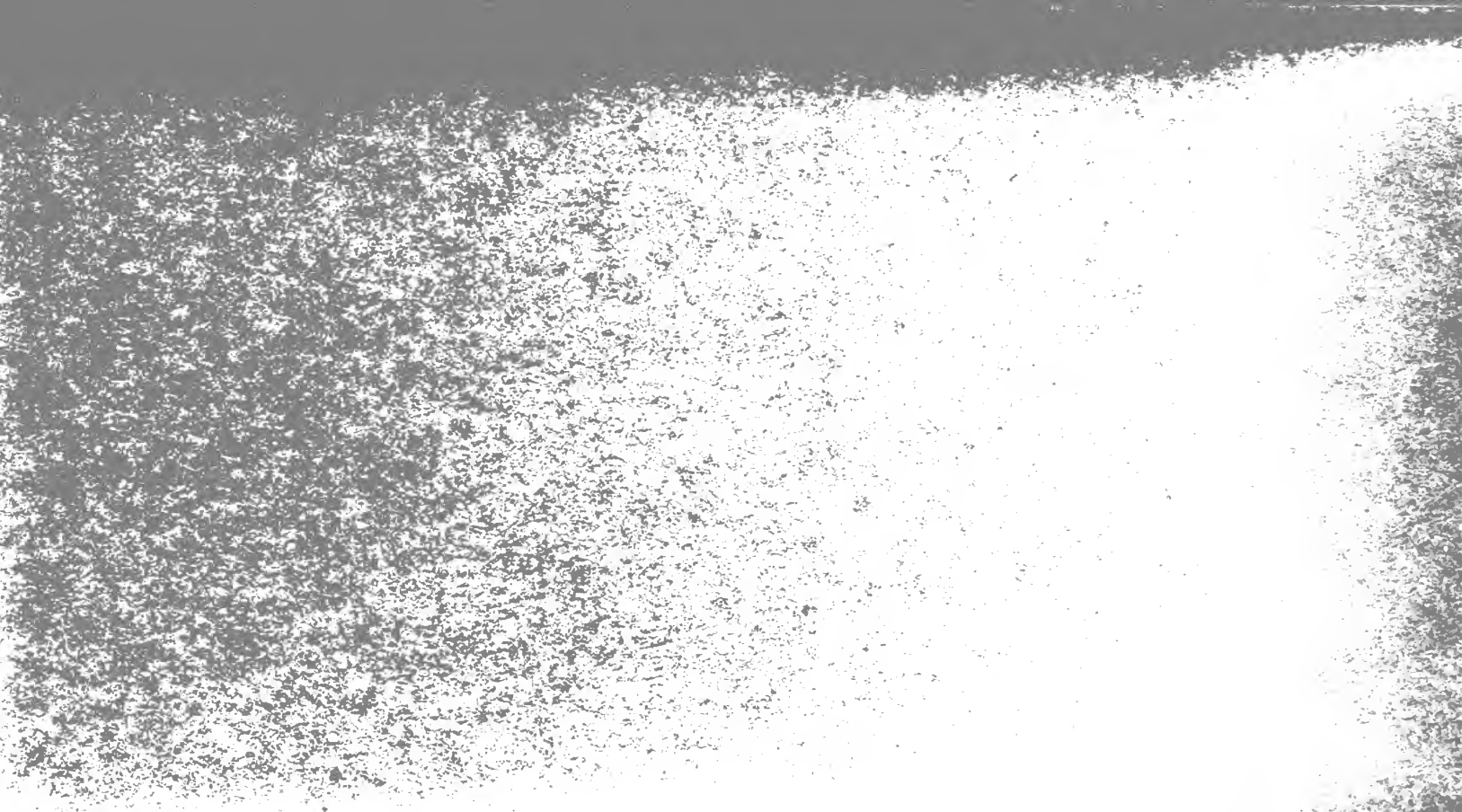

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Appellee.

APPELLANTS' REPLY BRIEF.

Introduction.

Since the filing of Appellants' Opening Brief and Appellee's Brief, the authorities in Mexico have ruled on plaintiff-appellee's nullification proceedings in Mexico. There must now be brought to the attention of the Court, therefore, the fact that the Mexican authorities have denied plaintiff's application for a registration of the trade-mark "Las Palmas" in Mexico and have denied plaintiff's prayer that defendants' registration of that trade-mark be nullified and cancelled.[1] That it is proper

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[1]This information was received by appellants' counsel just before Appellants' Reply Brief was to be sent to the printer. A new introduction and some changes in the text were hastily written to include this new information. The information was forwarded by appellants' Mexican counsel, and the attorneys here will obtain as soon as possible certified copies of the order of the Mexican authorities, for filing in this Court. The pertinent portion of the Mexican order is as follows: "1. The declaration of nullification of the trade-mark 76068 'Las Palmas' which covers articles of classification 46 is denied." Determination of an appeal from a preliminary injunction, of course, should be made on a record which includes all facts relevant to the time of determination of the appeal. (*Cal-Dak Co. v. Sav-On Drugs,* 40 Cal. 2d 492, 496-497, 254 P. 2d 497 (1953); see also cases collected in 59 Harv. L. Rev. 957.)

for us on appeal from a preliminary injunction to bring the Mexican ruling to the attention of the Court, please see *Steele v. Bulova Watch Co.,* 344 U. S. 280. That the matter is determinative, and that the injunction must now be reversed, please see the *Bulova Watch* case, *supra,* and *Vanity Fair Mills, Inc. v. T. Eaton Co.,* 234 F. 2d 633 (2nd Cir., 1956), cert. den. 352 U. S. 871 (1956).

Especially because of the Mexican ruling, we do not pause here to take issue with appellee's contention that our summary of the facts in Appellants' Opening Brief "omitted mention of various points which bear on the questions of law raised on this appeal." (Resp. Br. p. 2.) The determinative facts are certainly not in dispute on this appeal:

(1) Defendants-appellants have a valid Mexican trade-mark "Las Palmas". Appellants right to this mark in Mexico has been determined in adversary proceedings between the parties in Mexico.

(2) Plaintiff-appellee has a valid, and prior, United States trade-mark "Las Palmas."

(3) Defendants-appellants purchase various items—such as cans, cartons, and labels—in the United States for use in their operations in Mexico. However, since December, 1954, defendants-appellants have made absolutely no sales whatsoever in the United States under the trade-mark or trade name "Las Palmas" or "Las Palmas Food Co., Inc." Rather, all of defendants' goods have been packed and sold exclusively in the Republic of Mexico. [Finding 18, R. 61.]

(4) The District Court also found that defendants' obtaining and use of the Mexican trade-mark "Las Palmas" was and is with intent to trade upon plaintiff's good will,

that some United States residents or citizens purchase food products in Mexican border cities and there is a substantial likelihood that such purchasers will be misled by defendants' "spurious products in Mexico" [Finding 26, R. 64], that consequently plaintiff's good will in both Mexico and the United States is placed in jeopardy, and also that purchases by plaintiff's wholesalers and brokers for shipment into Mexico have diminished.

(5) At the time of the issuance of the preliminary injunction, plaintiff had commenced proceedings in the Mexican forum to nullify or cancel defendants' Mexican registration of the trade-mark "Las Palmas". The Mexican authorities have now determined that the defendants' registration should not be cancelled or nullified.

The District Court enjoined defendants from using the trade-mark "Las Palmas" not only in the United States (where defendants have never used it), but also in the Republic of Mexico (where defendants are the confirmed registered owners of it). We respectfully submit that the District Court has no jurisdiction to issue an injunction enjoining sales in Mexico under a valid Mexican trade-mark registration and that, in any event, under the doctrine of comity such an injunction should not issue, especially where the parties have themselves appealed to the foreign forum. In any event, the foreign determination is now conclusive. We further submit that the appeal does not raise "a highly technical point of law" (Resp. Br. p. 1) but rather raises issues which go to the core of our federal courts.[2]

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[2]The identical issues in the *Vanity Fair* case were characterized by the Second Circuit as "interesting and novel questions concerning the extraterritorial application of the Lanham Act." (234 F. 2d 633, 636.)

I.

The District Court Has No Jurisdiction to Enjoin Sales in Mexico Under a Mexican Trade-Mark Registered to Defendants.

Appellee, on page 8 of its brief, lists four reasons in support of the injunction. Each is invalid, as shown by the cases.

(a) Appellee argues that the District Court had jurisdiction because two of the defendants are United States citizens and the third is domiciled here. The facts of citizenship and residence are correctly stated, and it is clear that the District Court did have *in personam* jurisdiction. But it does not follow that the District Court had jurisdiction over the subject matter, namely, sales in Mexico under a valid Mexican trade-mark. In both *George W. Luft Co. v. Zande Cosmetic Co.,* 142 F. 2d 536 (2nd Cir., 1944), cert. den. 323 U. S. 756 (1944), and *Vanity Fair Mills, Inc. v. T. Eaton Co.,* 234 F. 2d 633 (2nd Cir., 1956), cert. den. 352 U. S. 871 (1956), the court had *in personam* jurisdiction over the defendants and the defendants included, in the *Luft* case, United States citizens. Nevertheless, the courts held they had no jurisdiction to enjoin as the court below did here. As to the foreign national who is a defendant here, the language of the District Court in the *Vanity Fair* case is precisely in point:

> "This is far different from the ordinary transitory action for it seeks to have the Courts of one country invalidate a recognition of a status granted by a foreign country to a citizen of that country and effective only in that country." (133 Fed. Supp. 522, 527.)

This language was echoed by the Circuit Court:

> "We conclude that the remedies provided by the Lanham Act, other than in §44, should not be given an extraterritorial application against foreign citizens acting under presumably valid trademarks in a foreign country." (234 F. 2d 633, 643.) (At 644 the Court held that the benefits of Section 44 are also "limited in application to within the United States".)

(b) That defendants commit some acts in the United States pursuant to use of their Mexican trade-mark in Mexico—*e.g.,* purchase of cans and labels—was similarly insufficient in both the *Luft* and *Vanity Fair* cases, *supra,* to confer jurisdiction on the District Court to enjoin the perfectly proper foreign sales. Appellee argues further that the printing of defendants' labels in California was "unlawful" and "a criminal act" in California. (Resp. Br. pp. 8 and 12.) The District Court, however, refused to so find[3] and, of course, such a finding in any event would not confer jurisdiction on a United States District Court to enjoin acts in Mexico if that jurisdiction were otherwise lacking.

(c) That appellants' acts in Mexico diminished plaintiff's commerce in the United States and to Mexico clearly is not enough to confer jurisdiction of the sort

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[3]The District Court refused to sign appellee's Findings and Conclusions as originally proposed by appellee and deleted therefrom a conclusion reading as follows:

> "6. Defendants' activities in the State of California in pursuance of said unlawful plan of scheme to appropriate the plaintiff's established market and good will in the Republic of Mexico have included a violation of the penal provisions of Section 14321 of the California Business and Professions Code."

Yet it is to this Section 14321 that appellee refers in its brief, page 12.

here exercised. If it were, any act in a foreign jurisdiction, whether lawful there or not, and whether the effect here was lawful or not, could be enjoined by our courts so long as there was any impact upon commerce which Congress may regulate. But in both the *Luft* and *Vanity Fair* cases there was such impact, and no jurisdiction was found to issue such an injunction. Beyond that, we submit that the diminishing of a competitor's trade is not a "forbidden result" such as contemplated by the antitrust cases which appellee cites. (*United States v. Sisal Sales Corp.,* 274 U. S. 268: there the defendants were found to be engaged in an illegal combination and conspiracy to restrain and monopolize commerce and to increase prices within the United States; the acts of the defendants were themselves within the commerce Congress may regulate. But in the case at bar Congress may not regulate defendants' sales in Mexico of goods produced and packed in Mexico.)

(d) Appellee finally alleges that "appellants' conspiracy was planned in and has been directed from California." (Resp. Br. p. 8.) But this is merely a refinement of the arguments made in (a) and (b) on the same page of appellee's brief. There is no magic in the word "conspiracy" which will confer jurisdiction under the Lanham Act or alchemize into an enjoinable tort a sale in Mexico under a valid Mexican trade-mark.

The cases on which appellee relies are not to the contrary. In none of the trade-mark cases was there a valid foreign trade-mark under which the enjoined defendant was selling in the foreign market.

> *Vacuum Oil Co. v. Eagle Oil Co.,* 154 Fed. 867 (C. C., N. J., 1907), aff'd 162 Fed. 671, cert. den. 214 U. S. 515;

Morris v. Altstedter, 93 Misc. 329, 156 N. Y. Supp. 1103 (1916), aff'd 173 App. Div. 932, 158 N. Y. Supp. 1123 (1916);

Hecker H-O Co. v. Holland Food Corp., 36 F. 2d 767 (C. C. A. 2, 1929);[4]

Steele v. Bulova Watch Co., 344 U. S. 280.

It is true that when the *Bulova Watch* case was decided against defendant in the district and circuit courts (194 F. 2d 567), his Mexican trade-mark had not been cancelled. But the Supreme Court was careful not to rule on the correctness of those decisions; the Supreme Court considered the case as of the time it was argued before it, when defendant's Mexican trade-mark had been cancelled by the Mexican authorities.

> "The question, therefore, whether a valid foreign registration would affect either the power to enjoin or the propriety of its exercise is not before us." (344 U. S. at 289.)

In the *Bulova Watch* opinion (344 U. S. at 287, the *Luft* case was cited and approved), and the subsequent denial of certiorari in the *Vanity Fair* case (352 U. S. 871), show the validity of our position that the District Court is without jurisdiction to enjoin defendants' sales in Mexico under defendants' Mexican trade-mark. Of course, if the defendants' Mexican trade-mark were cancelled before determination of this appeal, the above cases cited by appellee might well be held to govern this case. Until such cancellation, we submit that the cases we rely on

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[4]There may have been a foreign trade-mark in this case, but "the court failed to recognize the possibility of a conflict between American and foreign law when such a foreign trademark existed." (70 Harv. L. Rev. 743, 745.)

show that the District Court exceeded its jurisdiction by issuing an injunction as here. Certainly now that the Mexican authorities have denied appellee's cancellation proceedings, the excess in jurisdiction is beyond dispute. The case is now on all fours with the *Vanity Fair* case, and a reversal is required.

The remaining cases cited by appellee—*Blackmer v. United States,* 284 U. S. 421, and *United States v. Stabler,* 169 F. 2d 995 (C. C. A. 3, 1948)—merely hold that there may be *in personam* jurisdiction over United States citizens even though they reside abroad. We do not quarrel with this principal, and we admit there was *in personam* jurisdiction over the defendants here.[5] But this does not confer jurisdiction of the subject matter—sales in Mexico of Mexican processed goods under a valid Mexican registration—upon the District Court, and how it sheds light upon the proper construction of the Lanham Act escapes us.

Finally, we must point out an inaccuracy in appellee's brief which may affect the merits here. Appellee writes that Conclusion of Law 5, that appellants have competed unfairly with plaintiff *in the United States,* is not attacked in our brief. (Resp. Br. p. 13.) On the contrary,

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[5]*Milliken v. Meyer,* 311 U. S. 457 (Resp. Br. p. 11), is likewise concerned merely with the mechanism of insuring due process in obtaining personal jurisdiction over a resident. In the case at bar no question concerning jurisdiction over the persons of the defendants is raised. The presence of such jurisdiction, however, does not reach the questions raised by this appeal. See paragraph (a) in text above.

the Court is referred to page 7 of Appellants' Opening Brief where one of the Specifications of Errors is that Conclusion of Law 5 is unsupported by the Findings of Fact.[6] Appellants' statement of the case and the argument in Part I of Appellants' Opening Brief all constitute an attack upon this Conclusion. Indeed, such was the purpose of reproducing Finding 18 in full in Appellants' Opening Brief (p. 6)[7] and such is the thrust of pages 9 to 12 of that brief. The findings of fact show competition between plaintiff and appellants only in Mexico; they show no unfair competition in the United States. The jurisdiction of the District Court falls for that reason.[8]

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[6]See also paragraph 2 of Statement of Points on Appeal, Transcript of Record, p. 83. For convenience in our opening brief we gathered all our arguments under the two headings there made. Heading I is at war with Conclusion 5 without more.

[7]"Since December, 1954, defendants have made *no sales in the United States* under any labels or packaging which including the words, name, or trade name 'Las Palmas' or 'Las Palmas Food Co., Inc.,' or any colorable imitation thereof; and *all sales* by defendants under labels or packaging bearing the trade-mark 'Las Palmas' have been made by defendants *in the Republic of Mexico* and none have been made in the United States; goods sold under such trade-mark by defendants have been packed *exclusively* in the Republic of Mexico." Finding of Fact 18, Transcript of Record, p. 61, emphasis added.

[8]Appellee is also of course inaccurate in stating that defendants Las Palmas Food Company, Inc., and Worthington "merely try to hide behind their confederate Baca." (Resp. Br. p. 11.) As shown by the *Luft* case, our argument that the District Court was without jurisdiction over the acts here involved applies equally to United States citizens and foreign nationals.

II.

The Doctrine of Comity Prevents Issuance of an Injunction as Here.

Appellee admits that the question raised under this heading was not determined by the Supreme Court in the *Bulova Watch* case, *supra.* Appellee therefore relies on the reasoning of the Fifth Circuit in *Bulova Watch Co. v. Steele,* 194 F. 2d 567 (C. C. A. 5, 1952). We submit that that reasoning is specious and that it is sophistry to argue that there is no conflict with the foreign sovereign in enjoining one from doing an act which he only is privileged to accomplish in the foreign territory by virtue of the sovereign's own grant of special status. Appellee's entire brief makes clear that the premise of the injunction is the thought that defendants' sales of their Mexican products in Mexico under a Mexican trade-mark registered to them by the authorities of Mexico constitute a wrongful and "illegal" act. How can this premise be rationalized as not an affront to the sovereignty of the foreign jurisdiction, which has deliberately conferred on defendants a special status making such sales privileged and protected!

If a choice must be made, we submit that the approach and reasoning of the Second Circuit in *Vanity Fair Mills, Inc. v. T. Eaton Co.,* 234 F. 2d 633 (2nd Cir. 1956), cert. den. 352 U. S. 871 (1956), must be preferred over that of the Fifth Circuit. We further submit that the denial of certiorari in the *Vanity Fair* case strengthens that case as authority here, especially since it arose after the *Bulova Watch* case. As the *Vanity Fair* case makes clear, the appropriate forum to determine the validity of defendants' sales in Mexico under their Mexican trade-mark is Mexico. Indeed, appellee recog-

nized the same fact, for appellee instituted proceedings in Mexico to test the validity of defendants' registration there. [Finding of Fact 34, R, p. 69.] That validity has been determined in appellants' favor.

We submit that the action of the Mexican authorities should be determinative of the validity of the sales in Mexico. If defendants' Mexican registration had been cancelled by the Mexican authorities, then our courts could also treat as wrongful the sales in Mexico. (*Steele v. Bulova Watch Co.,* 344 U. S. 280.) But as the record now stands, the Mexican authorities have conferred and reconfirmed to defendants the right to sell in Mexico under the trade-mark "Las Palmas", and an American court should not interfere with the status and rights so conferred. As long as the registration in Mexico is defendants', and especially after it has been contested there and reconfirmed, defendants may sell there without restraint by our courts. (*George W. Luft Co. v. Zande Cosmetic Co., supra,* and *Vanity Fair Mills, Inc. v. T. Eaton Co., supra.*) The fact that the Mexican authorities have now ruled in defendants' favor should be conclusive without more.

Conclusion.

The order and injunction appealed from should be reversed and the District Court should be directed to dismiss the action.

Respectfully submitted,

MASON & HOWARD, and
PAUL P. SELVIN,
Attorneys for Defendants-Appellants.

No. 15306

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LAS PALMAS FOOD COMPANY, INC., a corporation; PABLO BACA GAVALDON and RALPH WORTHINGTON,

Appellants,

vs.

RAMIREZ & FERAUD CHILI CO., a co-partnership composed of Frand Feraud and E. C. Feraud,

Appellee.

APPELLANTS' PETITION FOR REHEARING.

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Appellee.

APPELLANTS' PETITION FOR REHEARING.

Pursuant to Rule 23 of the Rules of this Court, appellants respectfully file herewith their Petition for Rehearing. We submit that despite the statement of this Court, all points relied upon for reversal were not—indeed, could not be—considered by the learned trial judge.

I.

Since the opinion of this Court there has been published in Mexico the judgment of the District Court on Administrative Matters in the proceedings between the parties here. That opinion affirms the ruling of the Mexican administrative agency (heretofore filed by appellants

in this Court) denying plaintiff's petition for cancellation of appellants' Mexican trade-mark registration of "Las Palmas."[1]

The judgment of this Mexican court is brought to the Court's attention because, we submit, it highlights that the one paragraph *per curiam* opinion of this Court is inaccurate. This inaccuracy is apparent from the very face of the opinion of the learned trial judge which this Court now adopts as its own. (See II below.)

While reserving our argued position on all points urged in our briefs, in this Petition we address ourselves primarily to the point that neither the trial court nor this Court has considered the effect of the adjudication in adversary proceedings by the Mexican authorities of the validity of defendants' Mexican registration.[2]

In this connection we must point out that the effect of the Mexican ruling is not vitiated by the argument that the Mexican adjudication is not final, though we doubt

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[1]Appellants' attorneys have been advised by letter from their Mexican correspondent that the judgment of the District Court on Administrative Matters was entered on August 5, 1957. Appellants will file a copy of this judgment as soon as they can obtain a translation thereof.

[2]We deem it proper also to point out that the trial court's estimate of the equities of the situation, which estimate may have been persuasive to this Court, is certainly questionable. Despite the adage that equity protects the vigilant and not the dilatory, an injunction has here been issued to a plaintiff who has not been vigilant in obtaining registration of its mark in the market really involved, Mexico. Despite the further adage that equity abhors a multiplicity of suits, an injunction has here been issued where there is another suit in a foreign forum instituted by this plaintiff and where that foreign litigation will be determinative of the validity of defendants' Mexican trade-mark.

that this argument can be properly made on this record.[3] The Mexican judgment is an adjudication in adversary proceedings by the tribunal with admitted jurisdiction on the pivot of the controversy between these parties—the validity of appellants' Mexican registration. Until it is reversed, it is binding on these parties.

If this Court nevertheless is willing to recognize that one further court in Mexico may affirm or reverse that adjudication, then we believe it is proper for us to represent to the Court that the Supreme Court of Mexico usually determines such appeals within a few months, either by that court's ruling on the merits or its refusal to hear the matter. We therefore respectfully urge that a rehearing be granted with oral argument to be set after determination of the matter by the Supreme Court of Mexico. Certainly this recognition, as a minimum, should be accorded foreign courts as a matter of comity.

We turn now to the obvious inaccuracy in the present opinion of the Court.

II.

This Court's opinion tersely states:

> "All of the points relied upon for reversal on this appeal were ably considered and disposed of by the trial judge in his opinion reported at 146 Fed. Supp., page 594. We adopt it as our own. For the reasons therein stated, the judgment is affirmed."

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[3]There is nothing in the record concerning Mexican law or procedure except (1) the bare language of some of the Mexican trade-mark law [Findings 31 and 32, R. 66-68]; (2) the affidavit of Juan del Avellano Ochoa, filed by defendants and to the effect that defendant Baca has the exclusive right to the trade-mark "Las Palmas" in Mexico [R. 21-22]; and (3) the decision of the Department of Economy of Mexico in defendants' favor (filed on or about May 24, 1957).

However, the case before the trial court did not include the critical fact now in the record that the authorities in Mexico before the hearing of this appeal ruled on plaintiff-appellee's nullification proceedings in Mexico and ruled in favor of appellants. See Appellants' Reply Brief and the decision of the Department of Economy of Mexico filed on or about May 24, 1957, in this Court.

The trial judge could not and did not consider the effect of such a ruling and consequently the arguments of appellants based thereon in this Court were not considered or disposed of by him. Indeed, the trial judge was careful so to state. At page 602 of 146 Fed. Supp. he states:

> "It should perhaps be emphasized that plaintiff does not seek a determination that any act of a foreign sovereign is invalid. (*Cf.: American Banana Co. v. United Fruit Co., supra,* 213 U. S. at 358; *Bernstein v. Van Heyghen,* 163 F. 2d 246, 249 (2d Cir.), cert. denied, 332 U. S. 772 (1947); *Banco de Espana v. Federal Reserve Bank,* 114 F. 2d 438, 443 (2d Cir. 1940).) *Nor does plaintiff ask this court to negate something that has already been determined in adversary proceedings between the parties at bar in a foreign forum.* (*Cf.: Vanity Fair Mills v. T. Eaton Co.,* 234 F. 2d 633, 646-647 (2d Cir.), cert. denied, 352 U. S. 871 (Oct. 15, 1956); *Geo. W. Luft Co. v. Zande Cosmetic Co.,* 142 F. 2d 536, 540 (2d Cir.), cert. denied, 332 U. S. 756 (1944).) Thus comity does not here argue against exercise of the power which the Congress has conferred." (Emphasis added.)

As this Court well knows, our argument here, especially after entry of the Mexican ruling above referred to, was based primarily on the *Vanity Fair* and *Luft* cases, *supra,* and their holding that adjudication in a foreign

country of the validity of a foreign trade-mark registration should, as a matter of comity, prevent a United States court from enjoining the use of said foreign registration in the foreign forum. See especially Appellants' Reply Brief.

It is significant that the trial judge in his lengthy opinion cited the *Vanity Fair* and *Luft* cases only in the paragraph above reproduced; that is, he held them inapplicable precisely because of the absence of the fact which is now part of the record but was not before him. In short, as he put it, "Nor does plaintiff ask this court to negate something that has already been determined in adversary proceedings between the parties at bar in a foreign forum."

Conclusion.

Appellants therefore respectfully urge that this Court grant a rehearing to consider the arguments made upon this record, which arguments were not considered and disposed of by the trial judge's opinion which the Court now adopts. In any event a rehearing to await the judgment of the Supreme Court of Mexico should be granted.

Respectfully submitted,

MASON & HOWARD, and
PAUL P. SELVIN,
Attorneys for Defendants-Appellants.

Certificate Pursuant to Rule 23.

State of California, County of Los Angeles—ss.

C. Loy Mason, being first duly sworn, on oath certifies and says:

That he is one of the attorneys for appellants in this cause; that he makes this certificate in compliance with Rule 23 of the rules of this Court; that in his judgment the within and foregoing Petition for Rehearing is well founded and that it is not interposed for delay.

C. Loy Mason.

Subscribed and sworn to before me at Los Angeles, Calif., this 22nd day of August, 1957.

T. W. Howard
Notary Public in and for said County and State.

NO. 15309

In the

United States Court of Appeals

For the Ninth Circuit

CHARLIE COX, *Appellant,*

v.

AMERICAN FIDELITY & CASUALTY CO., a corporation and UNDERWRITERS AT LLOYD'S, LONDON, *Appellees.*

APPELLEES' BRIEF

Appeal from the United States District Court for the District of Oregon

HONORABLE WILLIAM G. EAST, District Judge

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NO. 15309

In the

United States Court of Appeals

For the Ninth Circuit

CHARLIE COX, *Appellant,*

v.

AMERICAN FIDELITY & CASUALTY CO., a corporation, and UNDERWRITERS AT LLOYD'S, LONDON, *Appellees.*

APPELLEES' BRIEF

On Appeal from the United States District Court for the District of Oregon

HONORABLE WILLIAM G. EAST, District Judge

JURISDICTION

Appellant is a citizen of the State of Washington, Appellee American Fidelity & Casualty Co. is a Virginia corporation, and Appellees known as Underwriters at Lloyds, London are citizens of the United Kingdom. The other defendants in the action not parties to this appeal are citizens of states other than Washington. The amount in controversy exclusive of interest and costs exceeds the sum of $3,000.00. (R. 1-4, 17, 21, 33)

The jurisdiction of the District Court was based upon 28 USCA § 1332 and this court has jurisdiction under 28 USCA § 1291.

SUPPLEMENTAL STATEMENT OF THE CASE AND STATEMENT OF FACTS

Simply stated, this is a case in which an applicant for insurance was involved in a collision while his application for insurance was pending. Although the prospective applicant—appellant herein—seeks to enforce an agreement of insurance, or in the alternative an agreement to issue insurance, there was no evidence after a full disclosure of all the facts to the trial court of any contract or policy of insurance, nor was there any evidence of an agreement to issue insurance between appellant and appellees or any agent of the appellees.

In the early part of December, 1954, appellant Charlie Cox approached Grant H. Stringham Insurance Agency at Pasco, Washington, and asked about insurance on a Peterbilt truck and trailer (R. 289). Mr. Stringham advised Mr. Cox that he would seek to secure such insurance through the Company or companies of which he was a licensed agent. Hartford, Stringham's Company, declined to issue the coverage which Mr. Cox requested. (R. 290) Knowing that Mr. Cox desired higher limits than those which were available, Mr.

E. L. Van Vranken, Mr. Stringham's employee attempted to place the insurance somewhere else. (R. 303) Mr. E. L. Van Vranken on behalf of Mr. Stringham wrote to various brokers concerning the placing of the insurance. (R. 341) Among those to whom Mr. Van Vranken wrote was the Affiliated General Agency and Bates, Lively & Pearson, in Portland, Oregon. (R. 65) This letter was dated December 1, 1954 and requested a quotation of rates. (R. 65) On the 3rd day of December, 1954 Kenneth I. Tobey, Inc. through its employee, Stuart Richmond, wrote to the Stringham Agency and quoted rates with primary coverage in American Fidelity & Casualty Company, with excess in Lloyd's of London. An application blank was enclosed with this letter with a request for information regarding other insurance. (Ex. 3, Deposition of E. L. Van Vranken.)

On December 4th after consultation with Mr. Cox, Mr. Van Vranken sent a letter to Kenneth I. Tobey, Inc. enclosing the application of the appellant with the request that he be notified immediately if additional information was needed. (R. 55)

The application (R. 56) enclosed with Mr. Van Vranken's letter of December 4, 1954 was received by Kenneth I. Tobey, Inc. on the morning of the day of the accident in question, December 6, 1954. (R. 382) On the day that the application was received Mr. Rich-

mond wrote again to the Stringham Agency stating that additional information would be necessary before a policy could be issued, specifically with regard to the scope of the operations under which the truck and trailer would be operated, the description of the trailer, other information in connection with Oregon operations and requiring indemnity letters from other insurance companies. (R. 61) Also, on the day of the accident, December 6th, Mr. Richmond wrote to Markel Service, Inc. in Seattle, (the underwriting and engineering service of American Fidelity and Casualty Company), (R. 400-401) with the request that it bind the risk (R. 63) — this is necessary because of the Washington Statute requiring that a local agent countersign all insurance policies. (RCW 48.05.230) This application was received at Seattle, Washington, on December 7, 1954 and on the following day was sent to Los Angeles for acceptance or rejection by the head of the Underwriting Department of Markel Service (American Fidelity & Casualty Company). (R-405-406) The Seattle office of Markel Service did not accept the application or bind the risk because the application was incomplete. (R. 417)

It is conclusively established that neither Grant H. Stringham nor E. L. Van Vranken of Pasco, Washington were or are agents of either appellee nor did either have authority to bind appellees on insurance risks.

Stringham so testified (R. 297) as did Van Vranken (R. 306), Tobey (R. 52) and Richmond (R. 362, 363). Under insurance statutes of the State of Washington an agent before he can have binding authority must be specifically appointed by the insurance company and the appointment filed with the State Insurance Commissioner. (RCW 48.17.160)

Appellant's claim is based solely upon the assertion that Stringham and Van Vranken were agents of appellees. Appellant testified:

> "Q: * * * Now who do you claim was the agent of the American Fidelity & Casualty Co?
>
> A: Grant Stringham Insurance Agency in Pasco.
>
> Q: In your complaint when you say "its agents referred to above," did you have in mind Grant Stringham of Pasco, Washington?
>
> A: Yes, sir.
>
> Q: Did you name him anywhere in this pleading that you know of?
>
> A: I have been trying my damnedest to get him named. These gentlemen here ——
>
> Q: You have been trying to get him named in this pleading; is that right?
>
> A: Yes, sir.
>
> Q: He is the agent of the defendant you have reference to in paragraph XII of your pleading?
>
> A: Yes, sir. (R. 264)

Q: You state in paragraph XII that I referred to that the defendant American Fidelity & Casualty Company insured or agreed to insure your equipment. Now, can you tell me what you claim they did? Do you claim that they insured your equipment?

A: The way it was represented to me, they insured it.

Q: When you say it was represented to you, who made the representation?

A: Mr. Van Vranken.

Q: What was the representation he made to you?

A: That he had cleared the insurance and it was acceptable through them.

Q: Through them. Who do you mean by "them"?

A: The American Fidelity Casualty and Lloyd's of London, and they would take the coverage, but he would need some money to put it into effect." (R. 266-267)

The application for insurance which was signed by appellant and forwarded to Portland, Oregon stated immediately above appellant's signature:

"This application shall not be binding on Markel Service, Inc., and/or American Fidelity & Casualty Co., Inc., unless and until a policy shall be issued and delivered herewith, and then only as of the commencement date of such policy and in accordance with all terms thereof." (R. 59)

The application was never accepted and no binder was ever executed by any agent of appellees.

QUESTIONS PRESENTED

1. Does a question of fact exist as to the agency of Van Vranken and Stringham when as a matter of law under the laws of the State of Washington an agent must be formally appointed by the insurance company and neither Van Vranken nor Stringham were so appointed by either appellee?

2. Can appellant now claim that a question of fact exists as to insurance coverage when the application which bears his signature states that no insurance will be effective until a policy is issued?

3. Can appellant now claim that a question of fact exists as to insurance coverage when his application was never accepted?

4. Can appellant now claim that a question of fact exists as to insurance coverage when no "binder" was ever issued?

SUMMARY OF ARGUMENT

I

Under the Washington insurance laws an agent must be officially appointed by a company before he has any binding authority. Since in this case it conclusively appears

as a matter of law that neither Stringham nor Van Vranken were agents of appellees, appellant's testimony that Stringham told him he had insurance does not raise a question of fact.

II

Since the application for insurance signed by the appellant states on its face that no insurance will be effective until a policy is issued, no question of fact can arise as to the issuance of insurance here since it is undisputed that no policy was issued.

III

As a matter of fact, there is no evidence that appellees insured appellant or agreed to insure him.

ARGUMENT

I

Van Vranken and Stringham were not agents of appellees, and as a matter of law could not be.

Both Van Vranken and Stringham testified that they had no authority to bind appellees to an insurance contract (R. 297, 306). This was also the testimony of appellees' agents in Portland, Richmond and Tobey. (R. 362-363, 52)

There is no evidence in the record to the contrary nor has appellant ever claimed to have any evidence to the contrary.

Further, under the Washington insurance statutes it is clear that until an agent has been officially appointed by a company he has no authority to bind insurance risks.

RCW 48.17.160 "Appointment of Agents—Revocation" states:

> "Each insurer on appointing an agent in this state shall file written notice thereof * * * with the Commissioner * * *"

RCW 48.18.210 "Execution of Policies" says:

> "Every insurance contract shall be executed in the name of and on behalf of the insurer by its officer, employee or representative duly authorized by the insurer."

RCW 48.17.010 defines agent:

> " 'Agent' means any person appointed by an insurer to solicit applications for insurance on its behalf, and if authorized so to do, to effectuate and countersign insurance contracts * * *"

The Code further provides for insurance brokers.

RCW 48.17.260 says:

> "A broker, as such, is not an agent or other representative of an insurer, and does not have power, by his own acts, to bind the insurer upon any risk or with reference to any insurance contract."

The Supreme Court of Oregon considered similar Oregon statutes in the case of *Salquist v. Oregon Fire Relief Assn.*, 100 Or. 416, 197 P 312, holding that a stipulation in an application that no insurance would be in force until a policy was issued prevented an oral binder and that the statute providing that only agents who were authorized in writing could bind an insurer prevented proof of apparent authority. The court said:

> "Before the enactment of the standard policy law, the courts went to extremes in charging an insurance company upon the acts and declarations of anybody who so much as had the smell of agency upon his garments, however or whenever or for whatever acquired. But the statute has superseded such decisions and has fixed a standard to which all must conform, if they would impose liability upon an insurance concern."

In the case of *Reynolds v. Pacific Marine Insurance Co.*, 105 Wash. 666, 178 P. 811, it appeared that plaintiff applied for insurance on his ship with an insurance agency which was not an agent of the defendant company. A policy was issued which restricted coverage to certain specified waters and the loss occurred elsewhere. The plaintiff claimed that the alleged agent knew where the ship was to be used and this knowledge bound the defendant insurance company. The Supreme Court of Washington held the defendant was not bound

because the alleged agent was not in fact an agent pursuant to the insurance code. The court said (pg. 812 of 178 Pac.):

> "It becomes important, then, to determine whether Waterhouse & Co. was a broker in this transaction, or became an agent. In 1911 the Legislature enacted what is known as the insurance code. Laws of 1911, c. 49, P. 161. Section 2 is largely, if not entirely, devoted to the defining of terms which are used throughout the act. 'Agent,' or 'insurance agent,' is there defined as a person, duly appointed and authorized by an insurance company, to solicit applications for insurance and to be known as 'a soliciting agent,' or to solicit applications and effect insurance in the name of the company, to be known as 'a recording or policy writing agent.' The term 'broker,' or 'insurance broker,' is defined as a person, not being an appointed agent for the company in which insurance or reinsurance is effected, 'acts or aids in any manner in negotiating contracts of insurance or reinsurance, or placing risks or effecting insurance or reinsurance for a party other than himself or itself.' Section 17 contains a schedule of fees covering among other things agent's licenses. The broker's license fee is much larger in amount than the others. Section 20, among other things, provides that each and every broker, etc., doing business in this state 'shall be subject to and governed by this act.' Section 36 provides that it shall be unlawful for any insurance company, permitted to do business in this state, to write any policy of insurance covering risks located in the state, 'except through or by a duly authorized licensed agent of such company residing and doing business in this state.' Section 44 provides that every insurance agent shall annually, on or before the 1st day of April, procure an agent's license from the insurance

commissioner. In Section 100 it is provided that any person or party who solicits fire, marine, etc., business to be placed in an insurance company, other than represented by him, shall be deemed and considered as transacting a 'brokerage business and shall be required to procure a brokers license.' This section contains a proviso which it is unnecessary here to note, because it does not apply to the facts of this case, as Bowden, Gazzam & Arnold were not licensed recording agents of appellant.

"Under this statute it must be held that Waterhouse & Co. in the transaction here involved, was acting as a broker. The purpose of the Legislature apparently was to enact a complete insurance code which would cover the entire subject of insurance, as pointed out in * * * (Cites). The act expressly defines both insurance agents and brokers, requires that each, before doing business, shall obtain a license, and fixes the fees therefor. The undisputed facts show that Waterhouse & Co., under the provisions of the statute, was in relation to the transaction now before us, acting as a broker. Being a broker in this transaction, it was the agent of the owners of the boat * * *."

In the case of *Carstensen v. Standard Acc. Ins. Co.*, 111 P2d 565 (Wash. 1941) plaintiff sued to enjoin defendant from cancelling a truck liability insurance policy. He claimed that one Huff, a broker who he had purchased his policy through, had told him it was not cancellable and plaintiff claimed that this statement was binding on the insurance company. Concerning the alleged agency of Huff the Supreme Court of Washington said (pg. 567 of 111 P2d):

"Respondent also testified that all of his conversations relative to the policy were with Huff. *The testimony is undisputed that Huff was not licensed to represent appellant*, and that the Copeland Agency had no control over Huff. Huff acted as a broker, contacting prospects, and when he obtained a client, he took the client's application, then turning this application over to the Copeland Agency. If the application was accepted and a policy written. Huff received a commission only. Respondent gives as his excuse for not reading the policy, that he relied on his agent. We are satisfied that, under the facts in this case, Huff was an insurance broker and the agent of respondent, and not the agent of either appellant or the Copeland Agency. *Reynolds v. Pacific Marine Ins. Co.*, 105 Wash. 666, 178 P. 811." (Emphasis supplied)

In the case of *Day v. St. Paul Fire & Marine Ins. Co.*, 189 P. 95 (Wash.) it appears that plaintiff purchased a fire insurance policy through one Fraser, an insurance broker. There were false statements in the application but plaintiff claimed that Fraser knew the true facts and that this knowledge was binding on defendant. The trial court submitted to the jury the question of whether Fraser was an agent of defendant and the jury found for the plaintiff. The Supreme Court of Washington reversed. The court discussed the Washington Insurance Code requiring agents to be officially appointed and said (pg. 97 of 189 P.):

"Under the testimony, Fraser was not an agent of the appellant as defined by the statute, but performed all the acts which the statute defines as constituting one a broker, except that he had no license to act in that capacity. It is therefore argued by respondent that Fraser, not being a legally constituted broker under the act, was an agent of the insurance company, under the rule obtaining prior to the passage of the insurance code, which rule was that an insurance agent who places insurance in a company other than his own would be considered the agent of the insurer, so that the insurer would be bound by his acts and statements at the time of issuing the policy in the same manner as if he was its regularly appointed agent. Cooley's Briefs on Insurance, pp. 2491 and 2629; Mesterman v. Home Mutual Insurance Co., 5 Wash. 524, 32 Pac. 458, 34 Am. St. Rep. 877.

"The insurance code, however, being a complete act on the subject of insurance, had among its purposes the definite establishment of the status of agents, brokers, etc., and under that act a person, not an appointed agent of a company, who acts in any manner in negotiating contracts of insurance for a party other than himself, is a broker, and we have held in Reynolds v. Pacific Marine Ins. Co., 105 Wash. 666, 178 Pac. 811, that —

> 'Under the insurance code, Rem. Code, § 6059 —1 et seq., defining an "agent" as the person appointed and authorized to solicit applications and effect insurance, and a "broker" as a person not appointed who acts or aids in any manner in negotiating contracts of insurance for a party other than himself, and requiring larger license fees for brokers than for agents, an insurance concern that makes application to the agents of the company for a policy of marine insurance is a broker and acts as agent of the owners of

the boat, so that its knowledge would not be imputed to the company.'

"Fraser had no appointment or authority to solicit applications and effect insurance for the appellant; therefore, he could not be its agent. He aided in negotiating the contract of insurance with the appellant; therefore he was a broker. * * * Even though we might concede that Fraser was not a broker, yet the respondent should be bound by his acts upon the theory that Fraser was her agent, thus departing from the rule existing before the passage of the insurance code, *for the reason that the code expressly provides who shall be agents of the company, and was passed for the purpose of clearly defining the insurance company's duties and liabilities.* It was error therefore for the court to leave to the jury, as a question of fact for it to determine, the status of Fraser, and it should have been determined as a matter of law, that Fraser was either the agent or broker representing the respondent, and any knowledge he had or representations he made were the knowledge and representations of the respondent." (Emphasis supplied)

See also *Van Meter v. Franklin Fire Ins. Co.*, 164 F. 2d 325 (9 Cir. 1947), and *Abelson v. Fidelity & Casualty Co. of New York*, 2 P. 2d 272 (Wash.)

As pointed out in the supplemental statement of facts, supra, plaintiff himself testified that he based his claim for insurance on the fact that Stringham and Van Vranken told him he was insured. Since these gentlemen were not in fact agents of appellees, they could

not as a matter of law under the laws of Washington, as interpreted by the authorities discussed above, bind appellees. It therefore conclusively appears that there was no dispute in this case as to any material facts and appellees were entitled to summary judgment as a matter of law.

II

Appellant is bound by the words on the application that no insurance would be effective until a policy was issued. No policy was ever issued in this case.

Immediately before the signature of appellant on the application for insurance appeared the words: "This application shall not be binding on Markel Service, Inc., and/or American Fidelity & Casualty Co., Inc., unless and until a policy shall be issued and delivered herewith and then only as of the commencement date of said policy and in accordance with all terms thereof."

In the case of *Basinsky v. National Casualty Co.*, 122 Wash. 1, 209 P. 1077, it appeared that on October 26th the plaintiff signed an application for accident insurance and paid his premium. The application contained a clause such as in the present case that no insurance would be in force until the application was accepted by the company's home office or by an agent authorized to bind insurance. Plaintiff was injured on the same

day and the following day the application was accepted and a policy dated October 26 was issued and delivered. The plaintiff testified that he was told by the agent that he was insured when he signed the application. Plaintiff prevailed in the trial court. The Supreme Court of Washington reversed holding as a matter of law that the application was notice that the agent did not have binding authority and the evidence was conclusive that the application was not accepted until after the accident. The court said (pg. 1079 of 209 P.):

> "* * * The contract of insurance is made like any other contract. There must be a proposition by one party and an acceptance by the other. There must be a meeting of the minds. Here the accident happened after the proposition was made, but before it was accepted."

In the case of *Hansen v. Continental Casualty Co.*, 156 Wash. 691, 287 Pac. 894, plaintiff signed an application form with a broker on September 9 and on that day paid the broker part of the premium. The application contained a clause that no insurance would be in effect until the application was accepted and a policy issued. On the following day the plaintiff was injured in an accident and on the 12th at the request of the broker a policy was issued which was dated the

9th. The Supreme Court of Washington reversed a judgment in favor of plaintiff, saying (pg. 896 of 287 Pac.):

> "The rule that there is no liability on a policy, upon an application of the kind in the present case, for an injury occurring between the date of the application to which the policy was predated and the date on which the policy was actually issued, where such injuries were unknown to the insurer at the time of issuing and delivering the policy, goes hand in hand with another well-settled rule that changes in condition material to the risk which occur between the opening of negotiations for insurance and the issuance of the policy must be disclosed, as an elementary spirit of fair dealing."

See also the case of *Lauridsen v. Bowden, Gazzam & Arnold*, 107 Wash. 310, 181 P. 885, containing similar facts where the court held there was no insurance as a matter of law.

Since in this case it is undisputed that no policy was ever issued and since it is further undisputed that the application signed by the plaintiff said no insurance would be in force until the policy was issued, it follows as a matter of law that there was no insurance coverage. Appellees were entitled to summary judgment.

III

As a matter of fact, there is no evidence of a contract of insurance or a contract to insure.

Throughout his brief appellant argues that there is a question of fact in this case because appellant testified on his deposition that Van Vranken told him he was insured and that this was denied by Van Vranken.

As pointed out above, this makes no question of fact since as a matter of law Van Vranken was not an agent of appellees and anything he may have said would not raise a material question of fact as between appellant and appellees. Judge East recognized this when he ruled on the motion for summary judgment. He said (R. 249), "I do feel that probably Cox has a cause of action against the agent who promised him that he was covered."

It is undisputed and no further argument need be made that no policy was ever issued and no binder was ever issued by any person whomsoever. Every person who had any knowledge of the matter denied the issuance of the policy or binder.

Taking all the facts in this record in the light most favorable to appellant the only conclusion to be drawn is that appellant approached the Stringham agency and asked for insurance. The Stringham agency then wrote a letter to appellees' agents and was furnished an application form and a quotation of rates. On December 4 appellant signed the application form and it was returned to appellees' agents. It was received by them December 6th, the day of the accident, and on that day

the application form was forwarded from Portland to appellee American Fidelity's agents in Seattle with a request, "please bind coverage for this risk." Two days later, on December 8th, the Seattle office of appellee American Fidelity & Casualty Co. mailed the application to its Los Angeles office. The insurance was never bound. Therefore, it is conclusively established that no policy of insurance was ever issued and there is no evidence that any agent authorized by appellees ever told appellant he was insured.

ANSWER TO APPELLANT'S SPECIFICATIONS OF ERROR

Several points of law to which reference is made by the appellant are not germaine to the issues in this case and are mere generalities applying to insurance law.

Regardless of what has been said before in this brief, it is undisputed that several material factors and terms and conditions of the requested insurance were not decided upon between the parties. Even as late as two days after the accident when because of the incomplete application the Seattle office of appellee, American Fidelity & Casualty Co., without knowledge of the accident, declined to bind the risk or to countersign the policy. The terms and conditions of the requested insurance had not been agreed upon by the parties.

To create an enforceable insurance contract or contract to insure, the minds of the parties must meet upon the essential conditions and terms thereof. In general, it has been stated that the parties must have arrived at a mutual understanding concerning the parties to the risk, the subject matter, the risk insured against, amount of insurance, duration of the risk and premiums payable.

12 Appelman, Insurance Law and Practice, 161, Sec. 7122

Bird v. Central Manufacturing Ins. Co., 168 Ore. 1, 120 P2d 753.

An insurance contract, like other contracts, must generally contain two prerequisites to its validity, namely, an offer and an acceptance. A mere proposal or application for insurance standing alone does not constitute a contract upon which judgment can be recovered. It is merely an offer or request for insurance which may be either accepted or rejected by the insurer, and, until accepted, no contract of insurance results.

12 Appelman, Insurance Law and Practice, 154

Faughner v. Manufacturers Mutual Fire Ins. Co., 49 N. W. 643, 86 Mich. 536.

The rights of the parties in this action must be determined as of the time of the accident on December 6,

1954. The appellant has not pleaded, contended, stated, argued or claimed ratification or estoppel in this particular case. The material facts in this case are controlled by the correspondence existing between the Kenneth I. Tobey, Inc. agency of Portland, Oregon, and the Grant H. Stringham agency of Pasco, Washington. All of this correspondence or copies thereof were before the trial court at the time of the arguments on the motion for summary judgment. (R. 155a)

This correspondence was initiated by the letter of December 1, 1954, from Grant H. Stringham to the Affiliated General Agencies, Inc. and Bates, Lively & Pearson, Inc., which sets forth the fact that they had a request for 100/200/5 liability on a Peterbilt Diesel Tractor and semi-trailer for Mr. Charles Cox. This letter closed with the following statement:

> "If sufficient information is enclosed, we would appreciate rate quotations. If not, please advise and we will be glad to supply you with additional information."

This letter was promptly answered by Kenneth I. Tobey, Inc. by its underwriter, Stuart Richmond, on December 3, 1954, which set forth the total premium for the limits requested, how it would be broken down

between primary and excess coverage and in what companies the primary and excess would be placed, and enclosed an application which stated that the application would have to be completed and signed by the assured in the event the policy was desired. The Grant H. Stringham agency by E. L. Van Vranken answered on December 4, 1954, enclosing the application signed by the appellant and further pointed out in that letter that Mr. Van Vranken was not familiar with the application and hoped that he had gotten sufficient and satisfactory information for the underwriting and further requested immediate notification if any additional information or corrections were necessary. This letter was received on December 6, 1954, at 9:23 a.m. by Affiliated General Agencies, Inc. On the same day, the Kenneth I. Tobey, Inc. agency wrote a letter to the Grant H. Stringham agency to the attention of Mr. Van Vranken, stating, among other things, that there were several things which they would have to know before they would be able to issue the policy, namely, the description of the trailer, that indemnity letters would be needed from the other insurance carriers of the appellant, that the desired date of coverage of November 15, 1954, could not be used and that the date of December 6, 1954, the date that the request for a policy was received, would be the earliest date the policy could be dated and that if a filing was needed in the State of Oregon, the prem-

iums would have to be increased, as well as the limits of liability. This letter was not received by the Stringham agency until after the accident.

It is clear and undisputed that this correspondence does not constitute a contract of insurance or to insure, as there was no mutuality as to the terms of the contract between the appellant and the appellees concerning an offer and an acceptance. The subject matter was not clear in the application, namely, there was no description of the trailer to be insured, and the letter of December 6, 1954, of the Kenneth I. Tobey, Inc. agency requested additional information concerning the identity of the subject matter. The risk insured against was clear to the extent that the insured desired bodily injury and property damage insurance on a long-haul truck. However, there was no agreement as to the territorial limits of the risk, namely, whether or not an Oregon filing had to be made.

It is clear that the amount of insurance was not agreed upon. The original request was for property damage of $5,000.00 and if a filing had to be made in the State of Oregon as pointed out in the letter of Kenneth I. Tobey, Inc. of December 6, 1954, the property damage limits would have to be raised to $10,000.00.

As to the rate of premium, in view of the increase of the property damage limits to $10,000.00 and filings

in Oregon, if desired, the premium would be increased. This had not been agreed upon prior to the accident.

The duration of the risk was agreed upon as to the length of time the insurance should be in effect. However, the effective date was not agreed upon. The application itself requested insurance as of 11/15/54. The letter from Kenneth I. Tobey, Inc. agency stated that the insurance could not become effective prior to December 6, 1954. This was not communicated to the appellant until after the accident.

The identity of the parties was the only material element which was agreed upon by all of the parties, namely, that the appellant would become the insured and that if the insurance were written or accepted, the primary coverage would be in the appellee, American Fidelity & Casualty Co., and the excess in the appellees known as Underwriters at Lloyds, London.

It should be borne in mind that the testimony of the appellant and E. L. Van Vranken as disclosed from their depositions states that some of the necessary information requested in the letter of Kenneth I Tobey, Inc. of December 6, 1954, was supplied by the appellant to E. L. Van Vranken, but none of this information was ever communicated to Kenneth I. Tobey, Inc. or any other agent directly or indirectly connected with the appel-

lees. These facts conclusively establish that there was no contract of insurance or to insure. Appellant's arguments ignore the undisputed facts of this case and his assertion as to the law do not apply to the material facts of this case.

* * * * * * *

STATEMENT WITH RESPECT TO POSITION OF UNDERWRITERS AT LLOYDS

The position of appellees known as Underwriters at Lloyds is identical to the position of appellee, American Fidelity & Casualty Co., save and except that appellees known as Underwriters at Lloyds, London, were to be excess carriers. This fact is fully set forth in the letter of December 3, 1954, from the Kenneth I. Tobey, Inc. agency to the Grant H. Stringham agency, stating that the excess liability coverage of 90,000/180,000 excess of 10,000/20,000 would be placed with the Underwriters at Lloyds, London. (Ex. 3 deposition of E. L. Van Vranken) As such, there is no dispute as to any material fact concerning these appellees.

Excess insurance of this nature gives exposure to the insurance company only for a loss over and above the primary coverage. It attaches only when it is excess to a primary policy. In this particular case, it is clear that the appellees known as the Underwriters at Lloyds, Lon-

don, were to write only the excess policy. Therefore, it could not be written, could not be bound and could not be agreed to or otherwise entered into until such time as the primary policy was agreed upon. The evidence is clear that absolutely no action was taken in connection with the excess coverage, except there was a quotation as to the rates. (R. 386) There was no primary policy agreed to or agreement to issue a primary policy. The excess was not bound, nor was there an agreement to issue the excess or an agreement of insurance for the excess. Even if there had been an excess policy bound and even if the excess policy had been issued, since it is a following policy following a primary policy, there would be no excess insurance until such time as the primary policy had been issued. General custom and usage as to excess insurance is that the excess is bound to a primary policy by the name of the primary company and the insurance policy number of the primary company.

CONCLUSION

There is no genuine issue of any material fact in this case. It is undisputed that neither Stringham nor Van Vranken were agents of appellees. It is further undisputed that the application for insurance signed by the

appellant clearly stated that there would be no coverage until a policy was *issued*.

Complaint is made by the appellant that no pretrial order was ever submitted in this cause. The record will reveal that in lieu of a pretrial order the parties agreed to substitute a statement of their contentions.

Appellant attempts to obtain a reversal of the lower court's granting of the motion for summary judgment upon his assertion that there is a question of fact, but he refers only to the dispute between Van Vranken and himself. It is clear that there is a dispute between these two men as to what was said, but there is *no dispute* as to the lack of Van Vranken's or Stringham's authority. It is clear that no binder was ever issued and that no policy was ever issued.

Appellant seeks to gain some comfort by his assertion that the credibility of the witness is for the jury to consider. The only time the credibility of a witness was involved in this case is the dispute between appellant and Van Vranken, but the vital elements of this case are, as we have shown undisputed, and this includes not only the oral testimony but the correspondence between the parties.

Appellant seems to gain comfort from the fact that due to an oversight the original depositions were not filed by the time the motion for summary judgment was heard. The record will disclose that all counsel had at the time of argument the depositions of all the parties who had knowledge of the subject matter of this case. References by appellant's counsel, as well as appellees' counsel, to the depositions were freely made during the course of the argument and no objection was voiced at that time to the manner in which the hearing was conducted, and no objection was made by any person that the references that counsel made to the matters of fact to which the witnesses testified by deposition were in any manner incorrectly relayed to the court.

Appellant in an impassioned plea to this court states that he has been deprived of his constitutional right to a trial by jury, yet the record in this case (R. 122) will disclose that appellant himself on June 16, 1955, after American Fidelity & Casualty Co. had interposed a demand for jury, *objected* to having this case tried by a jury.

The trial court committed no error. The testimony of every person known by any party to have knowledge of any material fact in this case had been taken prior to the hearing on the motion for summary judgment.

It was upon this undisputed testimony that the trial court felt compelled to grant the motion for summary judgment. The trial court must be upheld.

Respectfully submitted,

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Nos. 15,313 and 15,312

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES ALONZO ROGERS and EUGENE BURWELL,

Appellants,

vs.

HARLEY O. TEETS, Warden, California State Penitentiary, San Quentin, California,

Appellee.

APPELLEE'S BRIEF.

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Appellee.

APPELLEE'S BRIEF.

STATEMENT OF THE CASE.

On May 25, 1955 both appellants Burwell and Rogers filed petitions for writs of habeas corpus. On May 26, 1955 the United States District Court filed orders to show cause returnable June 9, 1955, and orders staying the execution of both petitioners. On June 9, 1955 appellee filed a return to the order to show cause. On May 10, 1955, Judge Hamlin of the District Court filed an order denying the petitions for writs of habeas corpus and discharging the orders to show cause in both cases. On June 14, 1955, Judge Hamlin denied a certificate of probable cause to

Burwell, and on June 17, 1955, denied a certificate of probable cause to Rogers. Notices of appeal were filed by both appellants on June 16, 1955. On August 6, 1956, this court granted certificates of probable cause. These are appeals from the orders denying the petitions for writs of habeas corpus and discharging the orders to show cause.

STATEMENT OF FACTS.

Appellants James Alonzo Rogers and Eugene Burwell were inmates of the State Prison at San Quentin. They were charged with murdering two San Quentin guards on January 14, 1952. On October 17, 1952, after a lengthy trial by jury, each of the defendants was found guilty and death sentences were imposed.

All references below are to the reporter's transcript of proceedings in the California trial court.

On January 12, 1952, defendants James Alonzo Rogers and Eugene Burwell were inmates of San Quentin Prison. On that date Burwell was the chief clerk of the library and entitled to be in the library at night, and Rogers was in the "Guidance Center", which he was not permitted to leave at night.

On Saturday, January 12, 1952, Rogers arranged with Inmate Bragg to switch, or exchange, cells on January 14, 1952 (RT 233). Pursuant to that arrangement, Bragg met Rogers in the prison library at about 12:30 p.m. on Monday, January 14, 1952, and exchanged identification cards and clothing (RT 246-

247). Included among the items Bragg delivered to Rogers at that time was Bragg's "activity card", which entitled Bragg to leave his cell between the hours of 6:00 and 8:00 p.m. for the purpose of attending school (RT 251, 253). In consideration of Bragg exchanging cells, clothing and identification and activity cards with him so that he could be released from his cell at night, Rogers promised to pay Bragg four cartons of cigarettes (RT 260).

At about 6:30 p.m. on the evening of January 14, 1952, Inmate Wolfe, an assistant clerk in the prison library, arrived at the library to complete some of his clerical work (RT 280). When Wolfe arrived at the library, the defendants Burwell and Rogers were in the rear reading room, and no one else was present in the library (RT 288). Approximately forty minutes later (7:10 p.m.) Wolfe observed Burwell and Officer Charles D. Wiget, one of the murder victims, walking through the library, past Inmate Wolfe's desk, to the rear room, which room was not visible from Wolfe's position (RT 291). A few minutes later, Wolfe heard "scuffling" sounds emanating from the rear room into which Burwell and Wiget had gone (RT 292). A few minutes thereafter, the defendants Burwell and Rogers came out of the rear room and after whispering between themselves, asked Wolfe to accompany them to the rear room. Wolfe proceeded into the rear room with Burwell and Rogers (RT 293-295).

Upon arriving in the rear room, Wolfe looked about the room but did not see Officer Wiget. At this point,

Burwell said to Wolfe, "He's dead". Wolfe observed a small knife in the hand of Burwell. At this time, and yielding to the orders of Burwell, Wolfe was tied to a chair and gagged by the defendants in another room of the library (RT 296-298).

The evidence established that the defendants planned an escape; that the defendant Burwell and Officer Wiget were unfriendly due to a prior disagreement and altercation; that as a result thereof the defendant Burwell planned "to get" Officer Wiget; that the officer's visit to the library on a regular tour of duty was anticipated by the defendants and they planned to attack him; that the weapons consisting of two knives, the separated blades of a pair of scissors and a hand axe were collected in anticipation of the attack; that at approximately 7:10 p.m. Officer Wiget knocked on the library door and was admitted by Burwell; that Rogers pretended to be ill as he lay on a table in a rear room off the main library reading room; that Officer Wiget first questioned Rogers' right to be in the library; that as he attempted to diagnose Rogers' trouble and to make an entry in his notebook, he was attacked by the defendants using the weapons theretofore concealed, and that in the ensuing struggle Wiget was killed.

His death was attributed to multiple injuries, the main causes being a stab wound penetrating the chest and abdomen, and partial asphyxia due to compression from a necktie drawn tightly about his neck following the struggle. During the assault on Wiget, Burwell received a stab wound through his back and into

his chest cavity. The wound was dressed by Rogers and external bleeding temporarily ceased.

At approximately 8:00 p.m. of the same night, Officer Virgil F. Stewart met Sergeant Dascombe and defendant Burwell in front of the prison library, engaged in conversation. Burwell told them there was a sick man in the library (RT 403). Burwell, Stewart and Dascombe entered the library together, and found Rogers lying on a library table in the rear room of the library, moaning, holding his side, pretending to be sick (RT 353-364). Rogers showed Inmate Bragg's identification card to Sergeant Dascombe and identified himself as Bragg (RT 405, 407). Sergeant Dascombe thereupon left the library to call for medical aid for Rogers. After Dascombe departed from the library, Officer Stewart placed a folded coat under Rogers' head, in order to make him more comfortable, at which point Burwell repeatedly struck Stewart from behind with a double-bladed hand axe (RT 358), and Rogers attempted to force a scissors-knife into Stewart's neck (RT 361:8).

As a result of this murderous assault, Officer Stewart suffered a fractured skull and severed finger and thumb (RT 353-364).

Thereafter, Sergeant Dascombe returned to the rear room of the library, at which time Officer Stewart was nowhere to be seen. Rogers got off the table on which he was lying, and Sergeant Dascombe observed a scissors blade in Rogers' rear pants pocket, which Dascombe thereupon seized (RT 426-427). Dascombe commenced to escort Inmate Rogers from the

library, at which time Rogers seized a broom and attempted to resist Dascombe (RT 410). Dascombe observed Officer Stewart rising from the floor, and observed that Stewart's head was covered with blood (RT 414). At this point, Burwell struck Sergeant Dascombe repeatedly from behind with the hand axe. Sergeant Dascombe lost consciousness, and as a result of this murderous assault he suffered a fractured skull and injuries to his hand and fingers (RT 1330).

The defendants Burwell and Rogers thereafter left the library and proceeded through the small mess hall to the "projection booth". They arrived at and entered the projection booth in the company of Officer Vern A. Mackin, where Inmate Gallegos was on duty to play records during the intermission of the basketball game which was then in progress in the small mess hall just below the projection booth (RT 449-450). Burwell sat in a chair, Rogers remained standing, and Officer Mackin advised Gallegos that Burwell and Rogers wanted some phonograph records to return to the library. A period of silence ensued, which was broken by Rogers' throwing his left arm around Officer Mackin's neck. Inmate Gallegos arose from his desk and attempted to assist Mackin by breaking Rogers' hold upon him. Gallegos observed a small knife in Rogers' right hand, and at the same time observed that Inmate Burwell was pulling the hand axe from his clothing, arising from his seat and walking toward Officer Mackin with the axe upraised. Burwell swung at Gallegos with the axe and Gallegos fell to the floor, uninjured. Gallegos crawled out of the

projection booth, and as he was leaving he heard Rogers say, several times, "Get him, Gene!" (RT 449-460). As he fled to give an alarm, Gallegos saw Officer Mackin on the floor with Rogers on his back and Burwell walking toward Officer Mackin with the axe in his upraised hand (RT 538-539).

At approximately 8:30 p.m. on the evening of January 14, 1952, Officer John Baird, who was on duty in the small mess hall, in response to an alarm given by Inmate Gallegos, proceeded to the projection booth and unlocked the door (RT 578).

Upon entering the projection booth, he found Officer Mackin's body lying on the floor thereof, in a pool of blood. Mackin's body heaved convulsively. The defendants Burwell and Rogers were found by Officer Baird in the locked projection booth, with Mackin's body, and the clothing of each of them was drenched in blood, and the hands of each were bloody, and both were breathing hard (RT 579-582).

A small bloody knife was in Rogers' possession at the time he was apprehended in the projection booth (RT 591).

The hand axe was found in the projection booth (RT 668-669).

Following their apprehension by Officer Baird in the projection booth, Burwell and Rogers were taken into custody and were interrogated and gave statements.

The causes of the death of Officer Vern A. Mackin were a stab wound into the heart and multiple skull fractures (RT 72).

The body of Officer Charles D. Wiget was found in a small room in the rear of the library, known as the "Book Stockroom" (RT 731-732), and the causes of his death were a stab wound through the abdomen into the liver, a stab wound through the back, ribs and into the right lung, and asphyxia due to compression about his neck (RT 53).

The California Supreme Court reviewed this case and affirmed the convictions. See *People v. Burwell,* 44 Cal. 2d 16, cert. den. 349 U.S. 936.

SUMMARY OF APPELLEE'S ARGUMENT.

I. The District Court could rely upon the record of the proceedings in the state Court, which determined the factual issues against the petitioners.

II. The District Court properly denied the petitions for habeas corpus on the ground that no violation of the rights of either petitioner was shown after the District Court had carefully examined the record and argument of petitioners' counsel.

A. *The admissions and confessions of the two petitioners were free and voluntary and no unfair methods were used to obtain the statements from the petitioners.*

B. *Members of petitioner Burwell's race have frequently served on petit juries and have not been discriminatorily excluded from Grand Jury service.*

C. *The motion for change of venue was properly denied.*

D. *Refusal to allow a defendant to inspect confidential investigation reports in the coroner's possession raises no due process question; the problem as raised in the State courts was couched in terms of an improper denial of continuance; the State court properly exercised its discretion in conditionally denying a further continuance.*

1. There is no rule which requires the State to disclose the evidence upon which it intends to rely, or which gives the defendant the right to ask such disclosure.

2. The order of the Court denying the continuance was a conditional order which required the prosecution to comply with a judgment rendered in the collateral proceeding pertaining to the disputed reports.

3. No prejudice was established by petitioners on the motion for new trial, or in any other proceeding, as a result of the denial of the continuance pending the outcome of the collateral action concerning the disputed records.

E. *The conduct and atmosphere of the trial were fair and unprejudiced.*

1. The commingling of the jury and the public raises no due process question; the repeated reference to the admonitions against discussing the case rendered the customary commingling of jury and pub-

lic of such unimportance that defense counsel did not sufficiently indicate an objection to the procedure during the trial.

2. The fact that the accused were inmates of the State prison, had participated in two killings and had threatened a prison break, makes the precautions taken by the People to retain custody of the accused reasonable. Petitioners were not deprived of due process by virtue of this reasonable restraint.

3. Petitioners also complain about the presence of an armed guard in an anteroom doorway. This guard, however, was not visible to the jury nor was he visible to the defendants while they were testifying.

F. *The conduct of the prosecutor was proper and no federal question is raised by petitioners' various contentions concerning leading questions and the argument to the jury, among other things.*

ARGUMENT.

I.

THE DISTRICT COURT COULD RELY UPON THE RECORD OF THE PROCEEDINGS IN THE STATE COURT, WHICH DETERMINED THE FACTUAL ISSUES AGAINST THE PETITIONERS.

The matters alleged in the petitions have been heard and determined in both the trial court and the Supreme Court of the State of California.

The District Court could, in its discretion, rely upon the determination by the state court. See *Brown v. Allen,* 344 U.S. 443, 463; 503-507; *Hall v. Skeen,* 125 Fed. Supp. 651, 653. Indeed, in the case of *Brown v. Allen,* 334 U.S. 443, at 506, the Supreme Court stated in part as follows:

> "When the record of the State court proceedings is before the court, it may appear that the issue turns on basic facts and that the facts (in the sense of a recital of external events and the credibility of their narrators) have been tried and adjudicated against the applicant. Unless a vital flaw be found in the process of ascertaining such facts in the State court, the District Judge may accept their determination in the State proceeding and deny the application."

The court at 465 stated as follows:

> ". . . As the state and federal courts have the same responsibilities to protect persons from violation of their constitutional rights, we conclude that a federal district court may decline, without a rehearing of the facts, to award a writ of habeas corpus to a state prisoner where the legality of such detention has been determined, on the facts presented, by the highest state court with jurisdic-

> tion, whether through affirmance of the judgment on appeal or denial of post-conviction remedies. See White v. Ragen, 324 U.S. 760, 764, 65 S. Ct. 978, 980, 89 L. Ed. 1348."

In the present case the state trial court received evidence on all federal constitutional issues which involved factual matters. Thus, lengthy evidence as to the free and voluntary character of the confessions was introduced and instructions given to the jury on this problem. Likewise, the court received evidence in the form of affidavits and testimony as to the necessity for a change of venue, and as to any racial discrimination in the selection of grand juries in Marin County. In each of these instances, the trier resolved any conflict of fact against the petitioners.

The District Court could properly rely upon the determination made in the trial court and by the Supreme Court of the State of California.

Thus, after reviewing the record including evaluating the psychological factors involved in the confessions, the District Court concluded that the confessions of Burwell and Rogers were free and voluntary.

II.

THE DISTRICT COURT PROPERLY DENIED THE PETITIONS FOR HABEAS CORPUS ON THE GROUND THAT NO VIOLATION OF THE RIGHTS OF EITHER PETITIONER WAS SHOWN AFTER THE DISTRICT COURT HAD CAREFULLY EXAMINED THE RECORD AND ARGUMENT OF PETITIONERS' COUNSEL.

A. THE ADMISSIONS AND CONFESSIONS OF THE TWO PETITIONERS WERE FREE AND VOLUNTARY AND NO UNFAIR METHODS WERE USED TO OBTAIN THE STATEMENTS FROM THE PETITIONERS.

The District Court, after reviewing the record, including evaluating the psychological factors, concluded that the confessions of Burwell and Rogers were free and voluntary and not obtained by unconstitutional methods. It is clear that the District Judge must look at the undisputed facts in determining whether the confessions of the petitioners were free and voluntary. This court should not, and can not, re-evaluate the credibility of the witnesses. This court must assume that the trier of fact believed those facts which were most favorable to the finding that the confessions were free and voluntary. The case of *Leyra v. Denno,* 347 U.S. 556, was based on the *undisputed facts* of the record. See 347 U.S. at 558. Also, see *Stein v. New York,* 346 U.S. 156, 180.

There may be some uncertainty as to the criteria for determining whether a confession is free and voluntary under the "due process" clause of the United States Constitution. However, *Stein v. New York,* 346 U.S. 156, indicates that the test is whether the confession is trustworthy. The rule is not that any coercion renders the confession inadmissible. It is coercion, physical or psychological, which destroys the

reliability of the confessions as evidence and renders a confession inadmissible.

Thus resolving the conflict of fact against the petitioners, we find that defendant Burwell carried a hatchet under his jacket to the protection booth and was found in the projection booth in a bloody state (RT 582:9; 748). The officers stripped him of his bloody clothes for evidence and as part of a shakedown for weapons. He was then led down the stairs from the projection booth and to the captain's office (RT 1084: 7). Petitioner was told to quicken his pace and he replied that he was in "no hurry" (RT 1074). This occurred in the mess hall basketball court. Later, before arriving at the captain's office, he was told to move faster, and upon his refusal to do so, his arm was placed behind him and he was hurried along (RT 1088). These actions were eminently reasonable. Defendant was an inmate in the prison, no one knew exactly what had occurred, whether this occurrence was an attempted escape by several persons, or whether defendant was the leader of a pre-arranged riot. There were 250 inmates in the vicinity of the small mess hall. Captain Nelson was worried about the temper of these 250 (RT 1084). Thus he was in a hurry and acted most reasonably in striking appellant on the shoulders and buttocks when he refused to move along.

Captain Nelson testified that a guard on a guard rail may have stated that the so-and-so's would be shot if the captain would let go of them. However, Captain Nelson rebuked the guard and emphatically

replied that no one would hurt them and that he would take them through safely (RT 1079-1080).

Contrary to petitioners' assertions, Captain Nelson testified that it was not raining at the time (RT 1082: 17).

Once petitioners reached the captain's office neither of them was struck, no promises or inducements were made, no threats were uttered (RT 943, 874). Petitioner Burwell was given a chair as soon as he asked for one (RT 869:6; 960:15). He did not complain of being ill until later and was then immediately given medical treatment (RT 878:25; 960:19).

The petitioner Burwell was not again questioned until more than twelve (12) hours after being given medical care and hospital treatment. Likewise, petitioner Rogers was not again questioned until the following afternoon (RT 1209-1213).

The brief of petitioner Burwell, sets out considerable testimony concerning the circumstances before and at the time of the confessions of Burwell and Rogers. Much of the testimony set out is that of petitioner Burwell, which the jury could, and did, disbelieve. The testimony as set out attempts to convey the impression that petitioner Burwell appeared pale and weak at the time of the questioning; that continuously during the time of the statements threats were made by correctional officers who were standing in and about the rooms where the statements of the petitioners were taken. The testimony of Captain Thompson and Nelson, and of District Attorney Weis-

sich, makes it clear that no threats were uttered, either by them or by correctional officers who were in and about the rooms where the statements were taken (RT 874:14-26; 880-881; 960:2-5; 1081). Likewise, Burwell's condition as described by the witnesses was that he simply looked tired (RT 958:8; 963:17-26). Likewise, petitioner Burwell did not appear to be frightened (RT 965:5).

Thus it appears that any force used occurred in the arrest or the securing of custody of the petitioners. Force used in the arrest has been held not to affect the voluntariness of the confession *(Roman v. State,* 23 Ariz. 67, 201 Pac. 551 (1921); *Connors v. State,* 95 Wisc. 77, 69 N.W. 981 (1897)).

Indeed, the confessions of Burwell and Rogers were not induced by the officers' conduct in securing their custody. Such action was not intended to induce the confessions, and their actions were not reasonably subject to the interpretation that the officers' actions were intended to induce a confession. Indeed, the statement by Captain Nelson, that the petitioners were not going to be harmed should have put them at ease. Especially when they were taken through without harm and were not harmed when they reached the captain's office. This conduct should have made it clear that the prior conduct in hurrying the petitioner Burwell along was not an inducement to a confession.

In the case of *Stroble v. California,* the defendant was struck and mistreated by the police officers after his arrest, although his first confession to the officers at that time was held to be involuntary. The confes-

sion given approximately two hours later in the district attorney's office was held to be free and voluntary. In the present case, no force was used other than that which was reasonably necessary to procure the the arrest. Here, the officers vocally stated that petitioners would not be harmed and then proceeded to and did carry through on said statement, and approximately an hour later, they confessed to the district attorney.

Likewise, the fact that defendant was in custody under arrest and without counsel does not affect the voluntary nature of the statements (*Hopt v. Utah,* 110 U.S. 574, 584; *Stroble v. Calif.,* 343 U.S. 181).

Indeed, these men were not ignorant or timid. They were physically tough and they were hard-minded. They were not inexperienced in the detection and investigation of crime, nor were they unaware of their rights. In fact, petitioner Rogers refused to sign these confessions and later demanded to see an attorney (RT 1146:13-19).

Compare *Stein v. New York,* 346 U.S. 156 at 185-186.

Likewise, petitioner Burwell contends that his confession of January 15, 1952, was involuntary. This confession was made the day following the commission of the offense and approximately twelve hours after his previous questioning by the officers and after having received medical care and attention for a wound inflicted by one of the petitioner's victims. Burwell was not pressured in any manner. Indeed, he was given a glass of water when he requested it. Further-

more, the testimony indicated that petitioner was rational and coherent, perfectly capable of expressing himself one way or the other during this interview (RT 1209).

The admissions and confessions of petitioner Rogers were likewise free and voluntary. On the night of the killings defendant Rogers was found in the projection booth. He was stripped of his bloody clothes and searched for weapons. Along with the codefendants he was taken to the captain's office. Apparently Rogers was more cooperative and moved along when so commanded, and thus was not struck at any time (RT 1074:12). What has been previously said in reference to the statement that the defendants would not be harmed is also applicable here. No threats, promises, or other inducements were made to Rogers (RT 1068-1069; 1102:23). His statements on January 14, 1952 were clearly free and voluntary.

Statements were also taken the afternoon following the evening the crimes were committed and the prior confession made. Petitioner Rogers had ample time for rest between the night and afternoon questioning.

These confessions given twelve (12) hours or more after the prior questioning are not subject to the contention that they were coerced. In the case of *Leyra v. Denno,* 347 U.S. 556 (1954), the petitioner had been questioned continuously for a period of many hours and had been given little time for rest and sleep. Furthermore, the later confession, held to be coerced in that case, was made five hours after the

first confession. As the court pointed out it was a part of a continuous process. On the other hand, compare the case of *Stroble v. California,* 343 U.S. 181 (1952), where the prior confession was held involuntary because of the use of force by the officers in striking the defendant, but where a second confession given only a little more than an hour later in the office of the district attorney was held to be voluntary. Likewise, in the case of *Lyons v. Oklahoma,* 322 U.S. 596, the United States Supreme Court held that a second confession given twelve hours after a prior invalid confession was free and voluntary.

Time is only one factor. In the present case, however, where no force was used to secure the confessions and no long and intermittent questioning in order to break the defendants' will to resist a confession was engaged in by the officers, the later confessions given after ample time for rest were clearly free and voluntary.

Furthermore, full instructions were given to the jury on the subject of the confessions. The jury was instructed to determine whether or not the confessions were free and voluntary, and if the confessions were free and voluntary the jury could consider that evidence in arriving at its verdict. The jury was instructed that in the event the confession was involuntary, such evidence should be rejected, and any verdict should be based on the remaining evidence in the case (RT 2776-2777).

The evidence, exclusive of the confessions, is clearly ample to support the verdict of the jury. The testimony

of the surviving officers, the inmates Wolfe and Gallegos, together with the admissions of the petitioners on the stand is sufficient to sustain the verdict. It should be noted that the statement of facts heretofore set out in this case, is taken entirely from the testimony of these other witnesses, and only the paragraph which refers to the defendants' plan to escape refers to matters contained in the confession. See *Stein v. New York,* 346 U.S. 156.

B. MEMBERS OF PETITIONER BURWELL'S RACE HAVE FREQUENTLY SERVED ON PETIT JURIES AND HAVE NOT BEEN DISCRIMINATORILY EXCLUDED FROM GRAND JURY SERVICE.

There is no question that an intentional and deliberate exclusion of members of a particular race is a contravention of the due process and equal protection clauses of the Fourteenth Amendment of the federal constitution, at least as to a defendant belonging to the race discriminated against. *Carter v. Texas,* 177 U.S. 442; *Brown v. Allen,* 344 U.S. 443, 470; *People v. Hines,* 12 Cal. 2d 535, 538.

There is no disagreement on principle. However, the facts establish that members of petitioner Burwell's race have not been excluded, intentionally or otherwise, from jury service in Marin County. The trial court received evidence relative to the determination of this motion. The facts, as indicated by this evidence, established the following facts:

According to the census figures Marin County's population in 1940 was 52,907, of which 514 were Negroes. That is, Negroes composed slightly less than 1% of the total population. In 1950, the population was 85,-

619, of which 2600 were Negroes. Thus, in 1950, Negroes composed 3% of the total population of Marin County. Petitioner conjectures, probably correctly, that the increase in the number of Negroes occurred in 1944 or thereabouts.

In 1950 a Negro minister, Willie Franklin, was summoned for Grand Jury duty. It is true that this minister was entitled to an exemption from service (Code Civ. Proc. §200(4)), but he was competent to serve (Code Civ. Proc. §198). He was not disqualified, he exercised a privilege by declining service. He could have served if he had been so inclined. Furthermore, the judge who selected the grand jurors testified that he had not as a matter of policy excluded Negroes (RT 30:6 [re motion]). Furthermore, it is conceded that Negroes have regularly served on trial jury panels in Marin County.

The fact that Negroes have been called to serve on trial juries and at least one has been called for grand jury service, coupled with the presumption that official duty has been performed, dispels petitioner's contention that discrimination in the selection of grand jurors in Marin County exists. For a discussion of the problem of proof of discrimination in jury selection, see 1 A.L.R. 2d 1291.

In cases like *People v. Hines,* 12 Cal. 2d 535, and *Patton v. Mississippi,* 332 U.S. 463, a period of many years elapsed without Negroes being selected for jury service. For example, in *Patton v. Mississippi, supra,* no Negro had served on a criminal court grand *or* petit jury for thirty years. Here, the period is short

and Negroes have been called for both trial and grand jury service. Petitioner has not established discrimination in selecting jury panels in Marin County.

C. THE MOTION FOR CHANGE OF VENUE WAS PROPERLY DENIED.

In California, a motion for a change of venue is a matter within the sound discretion of the trial court. *People v. Cullen,* 37 Cal. 2d 614, 627; *People v. McKay,* 37 Cal. 2d 792. There must be a compelling showing that defendants did not receive a fair and impartial trial before the trial court's ruling will be upset. Indeed, these are the same rules which govern changes of venue in federal courts. See *Reynolds v. U.S.,* 225 F. 2d 123 at 128 (5th Cir., 1955) cert. den. 350 U.S. 914, reh. den. 350 U.S. 929; *Bianchi v. U.S.,* 219 F. 2d 182, 191 (8th Cir., 1955) cert. den. 349 U.S. 915, reh. den. 349 U.S. 969.

Before the denial of a change of venue would amount to a denial of due process the trial of the accused would have to be conducted in an atmosphere of hysteria and prejudice. Compare, *Darcy v. Handy,* 351 U.S. 454 (1956). The problem of whether an atmosphere of hysteria and prejudice occurred is primarily a question of fact. The state trial court received evidence on this question and determined that a fair trial could be held in Marin County. A brief review of the facts indicates that there can be no doubt as to the correctness of the trial court's ruling in this regard.

Petitioners' by affidavit, complain that a fund drive for the widows of the deceased guards was made by

Marin County citizens. This collection culminated on March 1, 1952, with a benefit dance (CT 58). The trial was held well over five months (August 11, 1952) after this event. According to a local newspaper editor, the press coverage of the crime was customary and usual for an event of this type (CT 66). This coverage occurred at the time of the deaths (January 14, 1952), and the trial was held nearly seven months later. Furthermore, affidavits presented by the prosecution described the attitude of the community as unbiased and conducive to a fair trial (CT 66, 69). In view of these facts coupled with the trial court's own knowledge of the community attitude, it cannot be asserted that the trial court denied petitioners due process of law by denying a motion for change of venue. In addition, it appears that at the trial defense counsel did not exhaust their peremptory challenges (CT 153-164).

D. REFUSAL TO ALLOW A DEFENDANT TO INSPECT CONFIDENTIAL INVESTIGATION REPORTS IN THE CORONER'S POSSESSION RAISES NO DUE PROCESS QUESTION; THE PROBLEM AS RAISED IN THE STATE COURTS WAS COUCHED IN TERMS OF AN IMPROPER DENIAL OF CONTINUANCE; THE STATE COURT PROPERLY EXERCISED ITS DISCRETION IN CONDITIONALLY DENYING A FURTHER CONTINUANCE.

Petitioners contend that they were denied due process because they were denied access to certain confidential investigation reports in the coroner's possession. In the state trial court this contention was framed in terms of an abuse of discretion by the court in denying a motion for the continuance of the trial. The continuance was sought in order to allow the ap-

pellate court to review a mandamus proceeding which granted the petitioners the right to inspect certain extrajudicial statements of petitioners and denied them the right to inspect certain investigation summaries.

The documents involved in the dispute were intradepartmental communications of the Department of Corrections.

The papers sought were unsworn summaries and statements by subordinates to superiors concerning the investigation of the crimes involving the defendants, including defendants' extrajudicial statements given in the presence of employees. These documents were placed in the possession of the coroner by the department representatives. They were received by him pursuant to an understanding that they were confidential. The attorneys for the petitioner Rogers requested permission to inspect the matters in the coroner's possession. The permission was granted through the district attorney. That evening, after examining the documents and the circumstances under which they were received, the district attorney advised defense counsel that they would not be able to examine them further.

Defense counsel then sought a writ of mandate to compel the district attorney to open the documents to inspection. The court in the mandamus proceeding determined that the defense counsel should be permitted to inspect the extrajudicial statements of the defendants. The court further determined that the other documents were investigative reports concerning the apprehension, prosecution, and detention of criminals

and denied defendants the right to inspect them. The district attorney appealed this judgment and the petitioner Rogers cross-appealed.

It is clear that under both state and federal law application for a continuance is addressed to the discretion of the trial court.

This case is not concerned with the adequacy of the time in which to prepare for trial, since several months elapsed between the time of indictment and trial, and defense counsel had ample time to prepare for trial. The court's ruling raises no due process question. Its ruling may be supported on several grounds.

1. There is no rule which requires the State to disclose the evidence upon which it intends to rely, or which gives the defendant the right to ask such disclosure.

There is no due process requirement that the state disclose the evidence upon which it intends to rely. See *Leland v. Oregon,* 343 U.S. 790, at 801. Likewise, see *State v. Tune,* 98 Atl. 2d 881 (N.J. 1953); *People v. Supreme Court,* 245 N.Y. 24, 156 N.E. 84, 52 A.L.R. 200 (N.Y. 1927); *Commonwealth v. Bartellini,* 13 N.E. 2d 382, 385 (Mass. 1938). Also see *U.S. v. Garsson,* 291 Fed. 646, at 649 (D.C. S.D. N.Y. 1923). Compare *Stroble v. Calif.,* 343 U.S. 181, 197 (1952).

There is lengthy argument in the briefs of petitioners that these summaries were public records and were open to inspection by any member of the public and thus the district attorney's action was arbitrary.

It appears that under the law of California, the documents in question were confidential.

The reports in question were summaries by prison personnel to their superiors concerning the crimes here involved. They were investigative reports of or concerning the apprehension, prosecution and detention of criminals. They were thus of a confidential nature and not open to public inspection. See *People v. Pearson,* 111 Cal. App. 2d 9, 24; *Runyon v. Board of Prison Terms and Paroles,* 26 Cal. App. 2d 183, 184. See also *State v. Mattio,* 31 So. 2d 801 at 805, 212 La. 284 (1947); *Hale v. City of New York,* 296 N.Y.S. 443 (1937); *Massachusetts Mutual Life Ins. Co. v. Bd. of Trustees,* 144 N.W. 538, 178 Mich. 193.

These documents were placed in the possession of the coroner in fulfilling his official duties. They were given to him with the express understanding that they were confidential. These documents retain their confidential character in his hands. An opposite rule would obstruct desirable cooperation between governmental agencies concerned with law enforcement.

To cast this problem in terms of privilege and waiver is misleading. We do not have an evidentiary problem. None of the statements and summaries by prison personnel was admissible as evidence. The problem is simply one of the existence of a pre-trial right to inspect these summaries (see Exhibits D, etc. CT 273). As noted above, these records were confidential records pertaining to the investigation, apprehension, and detention of criminals, and thus not subject to public inspection.

The fact that defense counsel may have been granted permission by mistake or otherwise to inspect these

documents did not render them open to unlimited inspection. The information they gained thereby may have been a benefit to them. From the fact that petitioners may have been thus benefited, it does not follow that the documents must be further subjected to their inspection. The fact that they were temporarily shown these records was no detriment to them. No estoppel of the governmental agency to assert that the documents were confidential can be claimed by defendants by virtue of the fact they were given the advantage of a short inspection of these documents.

2. The order of the court denying the continuance was a conditional order which required the prosecution to comply with a judgment rendered in the collateral proceeding pertaining to the disputed reports.

As a condition of the denial of the continuance, the court compelled the prosecution to permit the defense to inspect the extrajudicial statements of the defendants. The court deemed this to be in compliance with the judgment in the collateral proceeding. Petitioner Burwell could ask nothing further since no appeal was taken by him from the judgment in the collateral proceeding. There was adequate time in which to inspect these statements before trial.

The defendant Rogers did appeal from the judgment in the collateral proceeding. However, the real basis for the requested continuance was the inability to inspect the papers pursuant to the collateral judgment while the appeal was pending (CT 86).

In light of the condition requiring the district attorney to comply with the collateral judgment the

court exercised its discretion most reasonably in denying the motion for continuance.

3. No prejudice was established by petitioners on the motion for new trial, or in any other proceeding, as a result of the denial of the continuance pending the outcome of the collateral action concerning the disputed records.

In the present case the defendants were allowed to inspect the confessions in advance of trial. This was more than they were entitled to. Furthermore, prior to the motion for a new trial the petitioners were permitted to inspect all of the documents (CT 252-330; Burwell's Brief, Supreme Court of the State of Calif., p. 54, line 18). In their motion for a new trial defendants did not show that the documents disclosed new evidence which was not available to them at the time of the trial (RT 2877:8-2894).

The contention that a defendant has been denied due process of law by failure of the trial court or the district attorney to make documents available to the defense before trial, requires a showing of prejudice as a result of the inability of the defense to acquire earlier access to the documents. See *Leland v. Oregon*, 343 U.S. 790, at 802.

E. THE CONDUCT AND ATMOSPHERE OF THE TRIAL WERE FAIR AND UNPREJUDICED.

The petitioners point to numerous events in the trial and contend that either separately or when combined the petitioners were denied due process of law. Many of the contentions made are concerned solely

with questions of state law and do not constitute federal questions.

1. The commingling of the jury and the public raises no due process question; the repeated reference to the admonitions against discussing the case rendered the customary commingling of jury and public of such unimportance that defense counsel did not sufficiently indicate an objection to the procedure during the trial.

The contention that commingling of the jury and the public deprived petitioners of a fair trial can be condensed to three issues. First, whether defense counsel sufficiently objected to this procedure. Secondly, whether the admonitions to the jury concerning discussing the case were legally sufficient. Thirdly, whether petitioners have established any prejudice.

The trial court has discretion to permit the jury to separate during recesses and adjournments. Penal Code §1121; *People v. Erno,* 195 Cal. 272, at 276; *People v. Coyne,* 116 Cal. 295.

This discretion was properly exercised in this case. Indeed, defendants did not consider this separate procedure of enough importance to adequately indicate an objection during the trial. At no point in the trial record was an objection of any type made to this separation. On the motion for a new trial affidavits were submitted which indicated that the matter was raised in chambers. However, defense counsel at that time were not emphatic. In this regard the court, at page 3045, line 8 R.T. states:

> "I think there was some passing remark about jurors being around the hallway where there were

other people. It wasn't, as I recall it, very pointedly called to the attention of the court."

Indeed, in the absence of a sufficient objection to commingling and some showing that the trial court should not allow the jury to separate, it can not now be urged that the court has abused its discretion in permitting the separation.

Likewise, defense counsel failed to object to the use of the short admonition. It is true that on two occasions defense counsel requested the admonition to the jury be given (RT 138:26; 2106:13). These were occasions when the judge was apparently going to overlook the admonition altogether, or had not yet reached the point of giving the admonition. On one of these occasions the court gave a modified short admonition and defense counsel agreed that it was sufficient (RT 139:9). The record does not show an objection to the short form of admonition (remember the admonition heretofore given). The court at one point stated that it was giving a full admonition "even though counsel has stipulated you may be admonished simply by reminding you of the admonition the code requires. . . ." (RT 1221:23). To this statement counsel did not object. Indeed, contrary to their assertion defense counsel did stipulate to the short form of admonition (CT 164:6). This fact, coupled with the fact that no objection was ever made to the short admonition, leads one to the conclusion that defense counsel have waived the right to now object. It has been held that a full admonition was waived where the court gave a short admonishment and no request

for any additional admonition was made nor any objection interposed. *Langley v. State,* 53 Okla. Crim. 401, 12 P. 2d 254, at 256 (1932).

On eight occasions spread throughout the trial the court gave full statutory admonition or a modification thereof (RT 22; 139; 346; 1221; 1682; 2046; 2106; 2315). On the other occasions the court told the jury to remember the admonition previously given. Petitioners also complain that no admonition was given at four recesses. However, there was no request for an admonition at these times. In view of the several emphatic admonitions throughout the trial in addition to the numerous reminders, the court has sufficiently complied with the requirement of admonishing the jury. The purpose of the admonition is to inform the jury of its duties not to discuss the case and to keep an open mind. This purpose was fulfilled in the present instance by the several admonitions throughout the trial in addition to the numerous reminders.

In the case of *Sundahl v. State,* 154 Nebr. 550, 48 N.W. 2d 689, at 698 (1951), it was held that the requirement of admonishing the jury was sufficiently complied with even though the court gave short admonitions at some recesses and omitted the admonition at others.

Assuming that full admonitions should have been given more often and that the jury should not have been allowed to separate, the defendant has not shown any injury. This matter was presented to the trial court on motion for a new trial. One juror, Mrs. Drexler, was in New York for a three months' stay

and her affidavit was unavailable (RT 3060:2). The affidavits of ten other jurors stated they did not discuss the case with anyone nor overhear any comments on the case (CT 359-368). The affidavit of the twelfth juror stated he did not discuss *the merits* of the case with anyone or hear any comments directed to the *merits* of the case (CT 358). This qualification was based on the fact that a spectator had approached him, but he walked away (RT 3065:4). The district attorney stated in an affidavit that he frequently had been in the halls and observed the conduct of the trial jurors and at no time did he observe or hear any person address any comments either to or within the hearing of the trial jurors upon any subject connected with said case (CT 357:9). These affidavits together with the trial court's own observations as to the jury's conduct is ample support for the finding that the non-isolation of the jury did not prejudice petitioners.

2. The fact that the accused were inmates of the State prison, had participated in two killings, and had threatened a prison break, makes the precautions taken by the People to retain custody of the accused reasonable. Petitioners were not deprived of due process by virtue of this reasonable restraint.

Where reasonable precautions are taken to retain custody of an accused, the fact that such precautions necessarily bring before the jury the fact that the defendant is a convict and perhaps a dangerous character, does not deprive him of a fair trial. *People v. Metzger,* 143 Cal. 447; *People v. Harris,* 98 Cal. App. 2d 662, 665; cf. *Kelly v. Oregon,* 273 U.S. 589, 591 (1927). Also see *Commonwealth v. Millen,* 194 N.E. 463, at 480.

The facts are as set out in the district attorney's affidavit (CT 355). Defendants were each day during said trial, transported from San Quentin Prison to the courthouse in San Rafael in a station wagon, and were taken into the courthouse, up the front steps and through the hall thereof with their hands handcuffed to their belts. Defendants were secured by chains which were concealed underneath their clothing, with a short length thereof held from behind by one of the correctional officers. Such security measures are customary, and constitute the usual practice of the Department of Corrections of the State of California and are always used whenever an inmate of San Quentin Prison is brought to the courthouse at San Rafael for a court appearance. The reason that defendants were not transported into the courthouse by means of the courthouse elevator was that the elevator had on many occasions become stuck between the floors of the courthouse, and it was deemed by those responsible for the custody of said prisoners, in the interests of safety, that the elevator should not be used.

There is a conflict as to when the restraining devices were removed (see RT 3163:7). However, assuming they were not removed until they arrived in the court room, this procedure was not unreasonable. It is not the fault of the prosecution that defendants were men who had already been convicted of crimes of violence, were prison inmates, and that one of them had planned an escape. The precautions here taken were reasonable. The court was as lenient as the circumstances of the case permitted.

Furthermore, defendants did not object to this procedure at any time during the trial. No motion or complaint was made to the court (RT 3100:23).

3. Petitioners also complain about the presence of an armed guard in an anteroom doorway. This guard, however, was not visible to the jury nor was he visible to the defendants while they were testifying.

During the trial an armed guard was stationed in the anteroom behind the bench and witness chair. This anteroom led to the judge's chambers and the hallway of the courthouse and had to be guarded to prevent any possibility of escape by that exit. This guard was not visible to the jury at any time during the trial (CT 354:13), nor was the guard visible to defendants while they were testifying (RT 3179:1; 3182:20). The gun was not pointed at defendants while they were in the witness chair (RT 3176:22). This gun was removed from the shoulder holster at this time and it was held in a ready position. That is, the gun was in his hand in a relaxed position but never pointed as if to aim (RT 3177:19). The guard never made any gestures toward defendants with the revolver (RT 3178:6-12). The ready position was necessary because of the short distance between the stand and the doorway (RT 3176:14; 3182:16).

This procedure was reasonable in view of the fact that defendants were inmates of the state prison, had killed two guards and wounded two others in an attempt to escape prison according to their extrajudicial statements, and one of them had subsequently planned an escape. See cases cited in B above.

This procedure apparently did not distract defendants while they testified. The trial court, who observed their demeanor while testifying, apparently did not feel that they were distracted while testifying. This view is supported by common sense facts; the guard was not visible to them while testifying, and accused were hardened inmates who were accustomed to the presence of guards.

F. THE CONDUCT OF THE PROSECUTOR WAS PROPER AND NO FEDERAL QUESTION IS RAISED BY PETITIONERS' VARIOUS CONTENTIONS CONCERNING LEADING QUESTIONS AND THE ARGUMENT TO THE JURY, AMONG OTHER THINGS.

The doctrine of due process of law cannot be employed on habeas corpus so as to test every decision and ruling of the trial court and to pass upon every minute phase of the criminal trial. Petitioners must establish basic and essential unfairness in the conduct of the trial. The burden of showing such essential unfairness is upon a petitioner who claims such injustice and it must be a demonstrable reality. This burden has not been sustained. The objection that a question is leading is merely an objection to form and not substance. Injury to a plaintiff is not very likely to occur in such procedure. Indeed, trial courts have a large discretion in permitting such questions. Such objections have now been abolished in English courts.

Likewise, the question as to the propriety of the use of memoranda to refresh the memory of witnesses is merely a question of state law.

It is submitted that in view of the evidence in the case that the prosecutor's argument to the jury to the

effect that the petitioners were a menace to society, incorrigible, beyond rehabilitation, malignant persons, etc., constituted legitimate argument. No due process question is involved. Cf. *Bauchelter v. New York,* 427 U.S. 430 (1943). Also see *Sampsell v. California,* 191 Fed. 2d 721, 724 (9th Cir. 1951).

It is respectfully submitted that the order of the Court discharging the order to show cause and dismissing the petition be affirmed.

Dated, San Francisco, California,
January 25, 1957.

EDMUND G. BROWN,
Attorney General of the State of California,
CLARENCE A. LINN,
Assistant Attorney General of the State of California,
ARLO E. SMITH,
Deputy Attorney General of the State of California,
Attorneys for Appellee.

No. 15315

United States
Court of Appeals
for the Ninth Circuit

See Vol. 3018

M. W. ENGLEMAN, as Assignee for the Benefit of Creditors Generally of Campagnola Food Products, Inc., a Corporation,

Appellant,

vs.

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION and INSURANCE COMPANY OF NORTH AMERICA, a Corporation,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—12-28-56

No. 15315

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Court of Appeals
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M. W. ENGLEMAN, as Assignee for the Benefit of Creditors Generally of Campagnola Food Products, Inc., a Corporation,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

HARRY J. MILLER,
9201 Wilshire Blvd.,
Beverly Hills, California.

For Appellees:

HINDMAN & DAVIS,
636 South Serrano Avenue,
Los Angeles 5, California.

In the United States District Court in and for the Southern District of California, Central Division

Civil No. 17589-T

M. W. ENGLEMAN, as Assignee for the Benefits of Creditors Generally of Campagnola Food Products, Inc., a California Corporation,

Plaintiff,

vs.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, a Corporation,

Defendant.

AMENDED COMPLAINT FOR DECLARATORY RELIEF AND TO RECOVER MONEY UNDER POLICY AND CONTRACT OF FIRE INSURANCE

Pursuant to the order dated February 9, 1955, granting a motion for more definite statement, plaintiff files this amended complaint, and complains and alleges against defendant:

I.

Jurisdiction is founded on diversity of citizenship and amount.

The plaintiff is a citizen of the State of California, and the defendant, General Accident Fire and Life Assurance Corporation, Limited (hereinafter sometimes referred to as the "Insurance Com-

pany") is a corporation incorporated under the laws of Great Britain.

The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars. [2*]

II.

The Insurance Company at all times herein mentioned has been and is doing business in this judicial district.

III.

On or about May 16, 1953, the Insurance Company executed and delivered to Campagnola Food Products, Inc., a California corporation (herein referred to sometimes as "Campagnola"), policy No. 784651 under which the Insurance Company insured Campagnola against loss by fire of equipment of Campagnola, to the extent of $11,000.00 and such policy remained in full force and effect to the commencement of this action.

IV.

Thereafter and prior to the night of August 7, 1954, the Insurance Company entered into an additional and oral agreement with Campagnola under which the Insurance Company additionally insured Campagnola against loss by fire of equipment of Campagnola for a sum of $11,000.00 besides the foregoing sum of $11,000.00 specified in the said policy; that the said agreement was separate from the policy; that the period for such additional insurance

*Page numbering appearing at foot of page of original Certified Transcript of Record.

commenced from August 2, 1954, and was to expire on May 16, 1955; the property insured against was equipment of Campagnola; the risk insured against was fire; there was to be a premium and consideration for such additional agreement of insurance, in accordance with customary rates.

V.

During the night of August 7, 1954, the said equipment was destroyed and lost by fire to an extent substantially in excess of $90,000.00.

Thereafter and on or about August 8, 1954, notice was given to the Insurance Company of such fire and loss.

VI.

Campagnola has duly performed all the conditions precedent [3] and required on its part under the terms of the said policy and contracts of insurance; and Campagnola has also rendered to the Insurance Company a proof of loss, signed and sworn to by Campagnola, and as required by the policy.

VII.

Prior to the commencement of this action, Campagnola assigned and transferred to the plaintiff all the right of Campagnola to recover any proceeds and insurance payable for any loss under the said policy and contracts of insurance; and the plaintiff is the owner and holder of such right.

VIII.

The plaintiff is entitled to recover from the Insurance Company by vitrue of the foregoing policy and

contracts of insurance, and the foregoing matters and things the sum of $11,000.00 as provided in the policy, and the additional sum of $11,000.00 under the additional agreement of insurance, or a total of $22,000.00 with interest thereon at the lawful rate from October 4, 1954, until paid.

IX.

Although demanded, the Insurance Company has failed, neglected and refused, and still so fails, neglects and refuses, to pay said sum of $22,000.00 or any part thereof.

X.

An actual controversy of a justiciable nature exists between the plaintiff and the Insurance Company, involving their rights and liabilities under the foregoing policy and contracts of insurance, which controversy is subject to the Federal Declaratory Judgment Act (28 U.S.C.A., Section 2201) and which controversy is as follows:

(a) The plaintiff claims that it is entitled under the policy and the contracts of insurance to recover the said $11,000.00 from the Insurance Company, and the additional sum of $11,000.00 from the Insurance Company under the contract of insurance and the Insurance [4] Company denies such claim, and claims that it is obligated to pay only the total sum of $11,000.00 under the policy of insurance.

(b) The plaintiff claims that there was and is an agreement of insurance between the Insurance Company and Campagnola wherein and whereby the In-

surance Company agreed to increase the amount of insurance from $11,000.00 as specified in the foregoing policy to $22,000.00, and the Insurance Company denies such claim, and claims that it is obligated only to pay the total sum of $11,000.00 under the policy of insurance.

Wherefore, the plaintiff prays and demands:

(1) That the court enter a declaratory judgment determining the respective rights and liabilities of the plaintiff and defendant, the Insurance Company, under the foregoing matters and things; and

(2) That the court enter a declaratory judgment directing the Insurance Company to pay the plaintiff the total sum of $22,000.00 with interest thereon, plus the cost of this proceeding; and

(3) That the court grant such other and further relief to the plaintiff against the Insurance Company as may be proper.

/s/ HARRY J. MILLER,
Attorney for Plaintiff.

The plaintiff hereby demands a trial by jury of the issues involved in the above-entitled court and action.

/s/ HARRY J. MILLER,
Attorney for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed February 18, 1955. [5]

In the United States District Court in and for the Southern District of California, Central Division

Civil No. 17590-T

W. M. ENGLEMAN, as Assignee for the Benefits of Creditors Generally of Campagnola Food Products, Inc., a California Corporation,

Plaintiff,

vs.

INSURANCE COMPANY OF NORTH AMERICA, a Corporation,

Defendant.

AMENDED COMPLAINT FOR DECLARATORY RELIEF AND TO RECOVER MONEY UNDER POLICY AND CONTRACT OF FIRE INSURANCE

Pursuant to the order dated February 9, 1955, granting a motion for more definite statement, plaintiff files this amended complaint, and complains and alleges against defendant:

I.

Jurisdiction is founded on diversity of citizenship and amount.

The plaintiff is a citizen of the State of California, and the defendant, Insurance Company of North America (hereinafter sometimes referred to as the "Insurance Company"), is a corporation incorporated under the laws of the State of Pennsylvania.

The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars. [7]

II.

The Insurance Company at all times herein mentioned has been and is doing business in this judicial district.

III.

On or about May 10, 1952, the Insurance Company executed and delivered to Campagnola Food Products, Inc., a California corporation (herein referred to sometimes as "Campagnola"), policy No. 61296 under which the Insurance Company insured Campagnola against loss by fire of equipment of Campagnola, to the extent of $12,000.00, and such policy remained in full force and effect to the commencement of this action.

IV.

Thereafter and prior to the night of August 7, 1954, the Insurance Company entered into an additional and oral agreement with Campagnola under which the Insurance Company additionally insured Campagnola against loss by fire of equipment of Campagnola, for a sum of $12,000.00 besides the foregoing sum of $12,000.00 specified in the said policy; that the said agreement was separate from the policy; that the period of such additional insurance commenced from August 2, 1954, and was to expire on May 10, 1955; the property insured against was equipment of Campagnola; the risk insured against was fire; there was to be a premium and considera-

tion for such additional agreement of insurance, in accordance with customary rates.

V.

During the night of August 7, 1954, the said equipment was destroyed and lost by fire to an extent substantially in excess of $90,000.00.

Thereafter and on or about August 8, 1954, notice was given to the Insurance Company of such fire and loss.

VI.

Campagnola has duly performed all the conditions precedent [8] and required on its part under the terms of the said policy and contracts of insurance; and Campagnola has also rendered to the Insurance Company a proof of loss, signed and sworn to by Campagnola, and as required by the policy.

VII.

Prior to the commencement of this action, Campagnola assigned and transferred to the plaintiff all the right of Campagnola to recover any proceeds and insurance payable for any loss under the said policy and contracts of insurance; and the plaintiff is the owner and holder of such right.

VIII.

The plaintiff is entitled to recover from the Insurance Company by virtue of the foregoing policy and contracts of insurance, and the foregoing matters and things, the sum of $12,000.00 as provided in the policy, and the additional sum of $12,000.00 under

the additional agreement of insurance, or a total of $24,000.00, with interest thereon at the lawful rate from October 4, 1954, until paid.

IX.

Although demanded, the Insurance Company has failed, neglected and refused, and still so fails, neglects and refuses, to pay said sum of $24,000.00 or any part thereof.

X.

An actual controversy of a justiciable nature exists between the plaintiff and the Insurance Company, involving their rights and liabilities under the foregoing policy and contracts of insurance, which controversy is subject to the Federal Declaratory Judgment Act (28 U.S.C.A., Section 2201), and which controversy is as follows:

(a) The plaintiff claims that it is entitled under the policy and the contract of insurance to recover the said $12,000.00 from the Insurance Company, and the additional sum of $12,000.00 from the Insurance Company under the contract of insurance and the Insurance Company denies such claim, and claims that it is obligated to [9] pay only the total sum of $12,000.00 under the policy of insurance.

(b) The plaintiff claims that there was and is an agreement of insurance between the Insurance Company and Campagnola wherein and whereby the Insurance Company agreed to increase the amount of insurance from $12,000.00 as specified in the foregoing policy to $24,000.00 and the Insurance Com-

pany denies such claim, and claims that it is obligated only to pay the total sum of $12,000.00 under the policy of insurance.

Wherefore, the plaintiff prays and demands:

(1) That the court enter a declaratory judgment determining the respective rights and liabilities of the plaintiff and defendant, the Insurance Company, under the foregoing matters and things; and

(2) That the court enter a declaratory judgment directing the Insurance Company to pay the plaintiff the total sum of $24,000.00 with interest thereon, plus the cost of this proceeding; and

(3) That the court grant such other and further relief to the plaintiff against the Insurance Company as may be proper.

HARRY J. MILLER,
Attorney for Plaintiff.

The plaintiff hereby demands a trial by jury of the issues involved in the above-entitled court and action.

HARRY J. MILLER,
Attorney for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed February 18, 1955. [10]

[Title of District Court and Cause.]

MINUTES OF COURT

FEBRUARY 21, 1956

Present: Hon. Ernest A. Tolin, District Judge;
Counsel for Plaintiff: Harry J. Miller;
Counsel for Defendant: E. Eugene Davis.

Proceedings: For pretrial hearing.

Court states that inasmuch as neither counsel have complied with pretrial order, that after pretrial proceedings are completed, they settle the form of pretrial order.

Attorney for plaintiff states that the original contract of insurance is separate from the oral contract of insurance, and that the validity of the oral contract is the only issue remaining.

It Is Ordered that counsel submit memoranda of the law and that further pretrial is continued to May 7, 1956, 11 a.m.

JOHN A. CHILDRESS,
Clerk.

[Title of District Court and Cause.]

Civil No. 17589-T

ANSWER TO AMENDED COMPLAINT

Comes Now Defendant, and for answer to Plaintiff's Amended Complaint herein:

I.

As to the averments of paragraph III of said Amended Complaint, admits the same but denies that said policy remained in full force and effect to the commencement of this action.

II.

As to the averments of paragraph IV of said Amended Complaint, denies said averments and each and every allegation, matter and thing in said paragraph IV contained.

III.

As to the averments of paragraph V of said Amended Complaint, admits that on or about August 7, 1954, equipment described in said policy No. 784651 was damaged, and admits that [12] on August 8, 1954, notice was given to Defendant, but states that it is without knowledge or information sufficient to form a belief as to the truth of the averment that said equipment was destroyed and lost by fire to an extent substantially in excess of $90,000.00, or in any other sum.

IV.

As to the averments of paragraph VIII of said Amended Complaint, denies that Plaintiff is entitled

to recover from Defendant the sum of $11,000.00, or the additional sum of $11,000.00, or the total sum of $22,000.00, with interest, or any other sum at all.

V.

As to the averments of paragraph X of said Amended Complaint, Defendant denies that there is a controversy which is subject to the Federal Declaratory Judgment Act, and denies that Plaintiff is entitled to recover under his Complaint any sums whatsoever from this Defendant.

Wherefore, Defendant prays that it go hence and have and recover its costs and disbursements herein.

HINDMAN & DAVIS,

By /s/ E. EUGENE DAVIS,
Attorneys for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed March 1, 1955. [13]

[Title of District Court and Cause.]

Civil No. 17590-T

ANSWER TO AMENDED COMPLAINT

Comes Now Defendant, and for answer to Plaintiff's Amended Complaint herein:

I.

As to the averments of paragraph III of said Amended Complaint, admits the same but denies

that said policy remained in full force and effect to the commencement of this action.

II.

As to the averments of paragraph IV of said Amended Complaint, denies said averments and each and every allegation, matter and thing in said paragraph IV contained.

III.

As to the averments of paragraph V of said Amended Complaint, admits that on or about August 7, 1954, equipment described in said policy No. 61296 was damaged, and admits that [15] on August 8, 1954, notice was given to Defendant, but states that it is without knowledge or information sufficient to form a belief as to the truth of the averment that said equipment was destroyed and lost by fire to an extent substantially in excess of $90,000.00, or in any other sum.

IV.

As to the averments of paragraph VIII of said Amended Complaint, denies that Plaintiff is entitled to recover from Defendant the sum of $12,000.00, or the additional sum of $12,000.00, or the total sum of $24,000.00, with interest, or any other sum at all.

V.

As to the averments of paragraph X of said Amended Complaint, Defendant denies that there is a controversy which is subject to the Federal Declaratory Judgment Act, and denies that Plaintiff

is entitled to recover under his Complaint any sums whatsoever from this Defendant.

Wherefore, Defendant prays that it go hence and have and recover its costs and disbursements herein.

HINDMAN & DAVIS,

By /s/ E. EUGENE DAVIS,
Attorneys for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed March 1, 1955. [16]

[Title of District Court and Causes.]

Nos. 17590-T and 17589-T

STIPULATION

It Is Hereby Stipulated and Agreed by and between the plaintiff and the defendants, Insurance Company of North America and General Accident Fire and Life Assurance Corporation, Limited, by and through their respective attorneys as follows:

I.

The defendant Insurance Company of North America agrees to pay to the plaintiff, concurrently with the signature of this [18] stipulation, the sum of $12,000 together with interest thereon at the rate of 7% per annum from December 6, 1954, until the date of this stipulation, and the plaintiff acknowledges the receipt of said sum.

The defendant General Accident Fire and Life Assurance Corporation, Ltd., agrees to pay to the plaintiff, concurrently with the signature of this stipulation, the sum of $11,000 together with interest thereon at the rate of 7% per annum from December 6, 1954, until the date of this stipulation, and the plaintiff acknowledges receipt of the said sum.

II.

That the said payments by the defendant Insurance Company of North America, and the receipt thereof by plaintiff, is and shall be only in satisfaction of the original face amount of $12,000 of the written policy #61296 issued on or about May 10, 1952, under which the said defendant insured Campagnola Food Products, Inc., to the extent of $12,000.

That the said payment by defendant General Accident Fire and Life Assurance Corporation, Ltd., and the receipt thereof by plaintiff, is and shall be only in satisfaction of the original face amount of $11,000 of the written policy #784651 issued on or about May 16, 1953, under which said defendant insured Campagnola Food Products, Inc., to the extent of $11,000. The foregoing payments and the receipt thereof, are not and shall not be in payment, satisfaction, release, impairment or modification of plaintiff's claim and cause of action against the said defendants, or either of said defendants, upon an alleged oral contract of insurance in 1954 involved in the above-entitled Court and action and the plead-

ings therein, and the plaintiff's claim and the cause of action against the defendants, or either of the defendants, upon the alleged oral contract of insurance are and may continue in full force and effect as though the foregoing payments had not been made. The said [19] payments by the said defendants and the receipt by the plaintiff of the aforesaid sums shall in no wise be construed as an admission by said defendants, or either of them, of the existence of said alleged oral contract of insurance.

III.

The foregoing stipulations and agreements shall be effective and prevail as between the parties notwithstanding the language contained in any draft or drafts which might be issued or delivered by the defendants or either of them to the plaintiff in connection with the payments in paragraph I hereinabove.

IV.

The Court may make its order in accordance with this stipulation on the ex parte application on behalf of any party.

Dated: April 4th, 1956.

/s/ HARRY J. MILLER,
Attorney for Plaintiff;

HINDMAN & DAVIS,

By /s/ E. EUGENE DAVIS,
Attorneys for Defendants.

It Is So Ordered.

/s/ ERNEST A. TOLIN,
District Judge.

Dated: April 5, 1956.

[Endorsed]: Filed April 5, 1956. [20]

[Title of District Court and Cause.]

Civil No. 17589-T

SECOND AMENDED AND SUPPLEMENTAL COMPLAINT FOR DECLARATORY RELIEF AND TO RECOVER MONEY ON CONTRACT OF FIRE INSURANCE

Pursuant to the order dated May 25, 1956, plaintiff files this second amended and supplemental complaint, and complains and alleges against defendant:

I.

Jurisdiction is founded on diversity of citizenship and amount.

The plaintiff is a citizen of the State of California, and the defendant, General Accident Fire and Life Assurance Corporation, Limited (hereinafter sometimes referred to as the "Insurance Company"), is a corporation incorporated under the laws of Great Britain.

The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars. [21]

II.

The insurance company at all times herein mentioned has been and is doing business in this judicial district.

III.

On or about May 16, 1953, the Insurance Company executed and delivered to Campagnola Food Products, Inc., a California corporation (herein referred to sometimes as "Campagnola"), policy No. 784651 under which the Insurance Company insured Campagnola against loss by fire of equipment of Campagnola, to the extent of $11,000.00, and such policy remained in full force and effect to the commencement of this action.

IV.

Thereafter and prior to the night of August 7, 1954, the Insurance Company entered into an additional and oral agreement with Campagnola under which the Insurance Company additionally insured Campagnola against loss by fire of equipment of Campagnola, for a sum of $14,000.00 besides the foregoing sum of $11,000.00 specified in the said policy; that the said agreement was separate from the policy; that the period for such additional insurance commenced from August 2, 1954, and was to expire on May 16, 1955; the property insured against was equipment of Campagnola; the risk insured against was fire; there was to be a premium and consideration for such additional agreement of insurance, in accordance with customary rates.

V.

During the night of August 7, 1954, the said equipment was destroyed and lost by fire to an extent substantially in excess of $90,000.00.

Thereafter and on or about August 8, 1954, notice was given to the Insurance Company of such fire and loss.

VI.

Campagnola has duly performed all the conditions precedent [22] and required on its part under the terms of the said policy and contracts of insurance; and Campagnola has also rendered to the Insurance Company a proof of loss, signed and sworn to by Campagnola, and as required by the policy.

VII.

Prior to the commencement of this action, Campagnola assigned and transferred to the plaintiff all the right of Campagnola to recover any proceeds and insurance payable for any loss under the said policy and contracts of insurance; and the plaintiff is the owner and holder of such right.

VIII.

The plaintiff is entitled to recover from the Insurance Company by virtue of the foregoing policy and contract of insurance, and the foregoing matters and things, the sum of $11,000.00 as provided in the policy, and the additional sum of $14,000.00 under the said additional agreement of insurance, or a total of $25,000.00 with interest thereon at the lawful rate from December 6, 1954, until paid.

IX.

Although demanded, the Insurance Company failed, neglected and refused to pay said sum of $25,000.00 or any part thereof, until April 4, 1956, when the Insurance Company paid the plaintiff the sum of $11,000.00 on the written policy, together with interest thereon, and the Insurance Company still fails, neglects and refuses to pay the said additional sum of $14,000.00 or any part thereof.

X.

An actual controversy of a justiciable nature exists between the plaintiff and the Insurance Company involving their rights and liabilities under the foregoing policy and contract of insurance, which controversy is subject to the Federal Declaratory Judgment Act (28 U.S.C.A., Section 2201) and which controversy is as follows:

(a) The plaintiff claims that it is entitled under the said [23] contract of insurance to recover the additional sum of $14,000.00 from the Insurance Company under the contract of insurance and the Insurance Company denies such claim.

(b) The plaintiff claims that there was and is an agreement of insurance between the Insurance Company and Campagnola wherein and whereby the Insurance Company agreed to increase the amount of insurance from $11,000.00 as specified in the foregoing policy to $25,000.00 and the Insurance Company denies such claim, and claims that

it is obligated only to pay the total sum of $11,000.00 under the policy of insurance.

Wherefore, the plaintiff prays and demands:

(1) That the court enter a declaratory judgment determining the respective rights and liabilities of the plaintiff and defendant, the Insurance Company, under the foregoing matters and things; and

(2) That the court enter a declaratory judgment directing the Insurance Company to pay the plaintiff the additional sum of $14,000 with interest thereon, plus the cost of this proceeding; and

(3) That the court grant such other and further relief to the plaintiff against the Insurance Company as may be proper.

/s/ HARRY J. MILLER,
Attorney for Plaintiff.

[Endorsed]: Filed May 25, 1956. [24]

[Title of District Court and Cause.]

Civil No. 17590-T

SECOND AMENDED AND SUPPLEMENTAL COMPLAINT FOR DECLARATORY RELIEF AND TO RECOVER MONEY ON CONTRACT OF FIRE INSURANCE

Pursuant to the order dated May 25, 1956, plaintiff files this second amended and supplemental

complaint, and complains and alleges against defendant:

I.

Jurisdiction is founded on diversity of citizenship and amount.

The plaintiff is a citizen of the State of California, and the defendant, Insurance Company of North American (hereinafter sometimes referred to as the "Insurance Company") is a corporation incorporated under the laws of the State of Pennsylvania.

The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars. [25]

II.

The Insurance Company at all times herein mentioned has been and is doing business in this judicial district.

III.

On or about May 10, 1952, the Insurance Company executed and delivered to Campagnola Food Products, Inc., a California corporation (herein referred to sometimes as "Campagnola"), policy No. 61296 under which the Insurance Company insured Campagnola against loss by fire of equipment of Campagnola, to the extent of $12,000.00, and such policy remained in full force and effect to the commencement of this action.

IV.

Thereafter and prior to the night of August 7, 1954, the Insurance Company entered into an addi-

tional and oral agreement with Campagnola under which the Insurance Company additionally insured Campagnola against loss by fire of equipment of Campagnola, for a sum of $15,000.00, besides the foregoing sum of $12,000.00 specified in the said policy; that the said agreement was separate from the policy; that the period for such additional insurance commenced from August 2, 1954, and was to expire on May 10, 1955; the property insured against was equipment of Campagnola; the risk insured against was fire; there was to be a premium and consideration for such additional agreement of insurance, in accordance with customary rates.

V.

During the night of August 7, 1954, the said equipment was destroyed and lost by fire to an extent substantially in excess of $90,000.00.

Thereafter and on or about August 8, 1954, notice was given to the Insurance Company of such fire and loss.

VI.

Campagnola has duly performed all the conditions precedent [26] and required on its part under the terms of the said policy and contracts of insurance; and Campagnola has also rendered to the Insurance Company a proof of loss, signed and sworn to by Campagnola, and as required by the policy.

VII.

Prior to the commencement of this action, Campagnola assigned and transferred to the plaintiff

all the right of Campagnola to recover any proceeds and insurance payable for any loss under the said policy and contracts of insurance; and the plaintiff is the owner and holder of such right.

VIII.

The plaintiff is entitled to recover from the Insurance Company by virtue of the foregoing policy and contracts of insurance, and the foregoing matters and things, the sum of $12,000.00 as provided in the policy, and the additional sum of $15,000.00 under the additional agreement of insurance, or a total of $27,000.00, with interest thereon at the lawful rate from December 6, 1954, until paid.

IX.

Although demanded, the Insurance Company failed, neglected and refused to pay said sum of $27,000.00 or any part thereof, until April 4, 1956, when the Insurance Company paid the plaintiff the sum of $12,000.00 on the written policy, together with interest thereon, and the Insurance Company still fails, neglects, and refuses to pay the said additional sum of $15,000.00 or any part thereof.

X.

An actual controversy of a justiciable nature exists between the plaintiff and the Insurance Company, involving their rights and liabilities under the foregoing policy and contracts of insurance, which controversy is subject to the Federal Declaratory Judgment Act (28 U.S.C.A., Section 2201) and which controversy is as follows:

(a) The plaintiff claims that it is entitled under the said contract of insurance to recover the additional sum of $15,000.00 [27] from the Insurance Company under the contract of insurance and the Insurance Company denies such claim.

(b) The plaintiff claims that there was and is an agreement of insurance between the Insurance Company and Campagnola wherein and whereby the Insurance Company agreed to increase the amount of insurance from $12,000.00 as specified in the foregoing policy to $27,000.00 and the Insurance Company denies such claim, and claims that it is obligated only to pay the total sum of $12,000.00 under the policy of insurance.

Wherefore, the plaintiff prays and demands:

(1) That the court enter a declaratory judgment determining the respective rights and liabilities of the plaintiff and defendant, the Insurance Company, under the foregong matters and things; and

(2) That the court enter a declaratory judgment directing the Insurance Company to pay the plaintiff the additional sum of $15,000.00 with interest thereon, plus the cost of this proceeding; and

(3) That the court grant such other and further relief to the plaintiff against the Insurance Company as may be proper.

/s/ HARRY J. MILLER,
Attorney for Plaintiff.

[Endorsed]: Filed May 25, 1956. [28]

[Title of District Court and Causes.]

Nos. 17,589-T and 17,590-T

MINUTES OF THE COURT

MARCH 30, 1956

Present: Ernest A. Tolin, District Judge.
Counsel for Plaintiff: Harry J. Miller.
Counsel for Defendant: E. Eugene Davis.

Proceedings:

For hearing on plaintiff's motion for order compelling defendants' compliance with pretrial stipulations.

Attorney for plaintiff states to the Court that defendant has filed no counter-affidavit in opposition to motion on the calendar today.

Attorney for defendant replies to plaintiff's argument.

Attorney for plaintiff moves for partial summary judgment.

Court states it cannot act upon motion for summary judgment in that no proposed summary judgment or findings and conclusions have been filed, but informs plaintiff's attorney that the Court will entertain such a motion upon short notice.

Court Orders that defendants having failed to furnish names of persons whose depositions plaintiff desires to take; that defendants jointly and separately be assessed costs for today's proceedings, and Court fixes the amount in the sum of $500, and

orders that said sum be paid before noon, April 2, 1956.

Court Orders that defendant furnish to plaintiff the names of those persons from whom plaintiff desires to take depositions, and that if defendant fails to do so, the Court will entertain an application re contempt.

Court states it expects the said depositions to be completed on May 7, 1956, when further pretrial will be had in these matters.

It Is Further Ordered that motion on the calendar today will be held in abeyance, pending the filing and determination of motion for partial summary judgment, which plaintiff intends to file.

JOHN L. CHILDRESS,
Clerk. [29]

[Title of District Court and Causes.]

Nos. 17,589-T and 17,590-T

MINUTES OF THE COURT

MAY 21, 1956

Present: Hon. Ernest A. Tolin, District Judge.
Counsel for Plaintiff: Harry J. Miller.
Counsel for Defendant: E. Eugene Davis.

Proceedings:

For further pretrial hearing.

Court states that memoranda has been filed by counsel and that these cases are ready for setting for trial.

Plaintiff requests leave to file waiver of jury trial.

Court denies said request by plaintiff.

It Is Ordered that these two cases are set for jury trial June 19, 1956, 10 a.m.

Attorney for plaintiff requests leave to file second amended and supplemental complaints in these cases.

Attorney for defendants opposes filing of same at this time, but states that after having had time to read the same he can stipulate to their filing.

Court states that if they cannot stipulate to the filing, to bring the matter on by written motion.

JOHN L. CHILDRESS,
Clerk. [30]

[Title of District Court and Causes.]

Nos. 17,589-T and 17,590-T

MINUTES OF THE COURT

MAY 25, 1956

Present: Hon. Ernest A. Tolin, District Judge.
Counsel for Plaintiff: Harry J. Miller.
Counsel for Defendant: E. Eugene Davis.

Proceedings:

For hearing on motion of plaintiff for leave to file and serve second amended and supplemental complaints.

Filed motion of plaintiff for leave to file second amended and supplemental complaints.

Attorney for plaintiff urges motion to file second amended complaint in these actions for the purpose of bringing issues up to date.

Plaintiff is willing to stipulate that defendants' present answers on file may be deemed answers to the second amended complaints.

Attorney for defendants opposes said motion.

Court Grants plaintiff leave to file second amended and supplemental complaints.

Filed plaintiff's second amended and supplemental complaint in each of these respective actions.

JOHN L. CHILDRESS,
Clerk. [31]

[Title of District Court and Causes.]

Nos. 17,589-T and 17,590-T

STIPULATION FOR ANSWER TO SECOND AMENDED AND SUPPLEMENTAL COMPLAINT

It Is Hereby Stipulated by and between the plaintiff and defendants, through their respective attorneys, as follows:

I.

That the answer of the defendants to the amended complaint in the above-entitled Court and action be and they are deemed to be the answer of the respective defendants to the respective second amended and supplemental complaint in the above-entitled Court [32] and action, except as follows:

(a) The answer of the defendant, General Accident Fire and Life Assurance Corporation, Limited, in paragraph IV of the answer to the amended complaint wherein the said paragraph IV refers to the additional sum of $11,000.00 shall be deemed to refer to the additional sum of $14,000.00, and wherein the answer refers to the total sum of $22,000.00 it shall be deemed to refer to the total sum of $25,000.00.

(b) The answer of the defendant, Insurance Company of North America, in paragraph IV of the answer to the amended complaint wherein the said paragraph IV refers to the additional sum of $12,000.00 shall be deemed to refer to the additional sum of $15,000.00, and wherein the answer refers to the total sum of $24,000.00 it shall be deemed to refer to the total sum of $27,000.00.

Dated: Los Angeles, June 15th, 1956.

/s/ HARRY J. MILLER,
Attorney for Plaintiff.

HINDMAN & DAVIS,

By /s/ E. EUGENE DAVIS,
Attorneys for Defendants.

[Endorsed]: Filed June 18, 1956. [33]

[Title of District Court and Causes.]

Nos. 17,589-T and 17,590-T

MINUTES OF THE COURT

JUNE 19, 1956

Present: Hon. Ernest A. Tolin, District Judge.
Counsel for Plaintiff: Harry J. Miller.
Counsel for Defendant: E. Eugene Davis.

Proceedings:

For jury trial — consolidated. Court convenes herein. All parties are present. Court Orders these two cases consolidated for jury trial, and that a jury now be impaneled and trial proceed.

The following jurors, duly impaneled, are sworn to try this cause:

1. Dorothy R. Brostoff
2. Zelick Holzman
3. Marguerite Lawson
4. Geraldine Leonetti
5. Patrick J. Costello
6. Cecelia D. Harper
7. Louise M. Kearney
8. Mario W. Richards
9. James J. Wallace
10. Charles I. Cooper
11. Alice V. Kehoe
12. Walter Hilker

Alternate Juror: Richard Rogers.

Attorney for plaintiff makes opening statement, and attorney for defendant makes opening statement.

Court admonishes the jurors not to discuss this cause. Counsel stipulate that the jurors may be deemed admonished at each recess and adjournment without the Court having to repeat it. At 11:48 a.m. court recesses.

At 2 p.m. court reconvenes herein, and all being present as before, including the jury and alternate juror, Court orders trial proceed.

Kenneth H. Klee is called, sworn, and testifies for plaintiff.

Plaintiff's Exhibits 1, 2 and 3 are received in evidence.

At 3 p.m. court recesses. At 3:30 p.m. court reconvenes herein, and all being present as before, including the jury and alternate juror, trial proceeds.

At 3:35 p.m. Court excuses the jury for the balance of the day, and Court and counsel take up matters of law.

Plaintiff's Exhibits 4 and 5 are marked for identification.

It Is Ordered that further jury trial of these two consolidated causes is continued to June 20, 1956, 9:30 a.m.

At 3:45 p.m. court adjourns.

JOHN L. CHILDRESS,
Clerk. [34]

[Title of District Court and Causes.]

Nos. 17,589-T and 17,590-T

MINUTES OF THE COURT

JUNE 20, 1956

Present: Hon. Ernest A. Tolin, District Judge.
Counsel for Plaintiff: Harry J. Miller.
Counsel for Defendant: E. Eugene Davis.

Proceedings:

For further jury trial. (Same order in each case.)

At 9:37 a.m. court convenes herein. All parties are present, and the jury and alternate juror are present. Court orders trial proceed.

Kenneth H. Klee, heretofore sworn, resumes the stand and testifies further.

Charles R. Love is called, sworn, and testifies for plaintiff.

Plaintiff's Exhibits 6, 4 and 5 are received in evidence.

At 10:45 a.m. court recesses. Jury deemed admonished.

At 11:07 a.m. court reconvenes herein, and all parties being present as before, including counsel for both sides and the jury and alternate juror, trial proceeds.

Plaintiff's Exhibit 7 is received in evidence.

Plaintiff rests. At 11:55 a.m. court recesses.

At 1:45 p.m. court reconvenes herein, and all parties being present as before, including counsel

for both sides, the jury and alternate juror being absent, trial proceeds.

Attorney for defendants moves for directed verdict in favor of defendants.

Attorney for plaintiff replies to defendants' motion.

Court informs attorney for defendants that said motion for directed verdict is obsolete and deems that said motion is made as a motion to dismiss; and

Court Grants said motion to dismiss without prejudice, and directs attorney for defendants to prepare and submit judgment of dismissal.

At 2:31 p.m. the jury and alternate juror are present and Court informs the jurors of said judgment of dismissal of these two actions; and

Court Orders the jurors discharged from these cases and excused until notified.

JOHN A. CHILDRESS,
Clerk. [35]

In the United States District Court, Southern District of California, Central Division

Civil No. 17589-T

M. W. ENGLEMAN, as Assignee for the Benefits of Creditors Generally of Campagnola Food Products, Inc., a California Corporation,

Plaintiff,

vs.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, a Corporation,

Defendant.

Civil No. 17590-T

M. W. ENGLEMAN, as Assignee for the Benefits of Creditors Generally of Campagnola Food Products, Inc., a California Corporation,

Plaintiff,

vs.

INSURANCE COMPANY OF NORTH AMERICA, a Corporation,

Defendant.

JUDGMENT OF DISMISSAL

These causes came on for trial on June 19th, 1956, in the above-entitled Court, consolidated for trial, before the Honorable Ernest A. Tolin, District Judge; and Plaintiff appeared by his attorney, Harry J. Miller, and Defendants appeared by their attorneys, Hindman & Davis, by E. Eugene Davis,

Sr., and E. Eugene Davis, Jr.; and a jury [36] was duly impaneled and sworn and Plaintiff introduced evidence in support of his cause and rested his cause; thereupon the Defendants made a motion which was treated by the court as a motion for dismissal on the ground that upon the facts and the law the Plaintiff had shown no right to relief, and the court granted the motions on behalf of the defendant with the provision, however, that the dismissal shall not operate as an adjudication on the merits and shall be without prejudice to the filing of further actions by the Plaintiff against the Defendants, and ordered judgment in accordance therewith;

It Is Hereby Ordered, Adjudged and Decreed that the above-entitled causes be and the same are hereby dismissed, but that the said dismissal shall not operate as an adjudication upon the merits and shall be without prejudice to the filing of any further action or actions by the plaintiff against the defendants and that the defendants shall recover from the plaintiff their costs and disbursements herein to be taxed by the clerk at $24.50.

July 3, 1956.

/s/ ERNEST A. TOLIN,
District Judge.

Approved as to form:

HARRY J. MILLER,
Attorney for Plaintiff.

HINDMAN & DAVIS,

By /s/ E. EUGENE DAVIS,

Attorneys for Defendants.

Affidavit of Service by Mail attached.

Lodged July 2, 1956.

[Endorsed]: Filed, docketed and entered July 5, 1956. [37]

[Title of District Court and Causes.]

Nos. 17,589-T and 17,590-T

NOTICE OF APPEAL FROM JUDGMENT

To the Above-Entitled Court and Its Clerk; and to the Defendants and Their Attorneys, Hindman & Davis:

The plaintiff hereby appeals to the United States Court of Appeals of the Ninth Circuit from the judgments and each of them [39] entered in the above-entitled court and actions on July 5, 1956, dismissing the said action.

August 1, 1956.

/s/ HARRY J. MILLER,

Attorney for Plaintiff and Appellant, M. W. Engleman, as Assignee for the Benefit of Creditors Generally of Campagnola Food Products, Inc., a California Corporation.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 21, 1956. [40]

[Title of District Court and Causes.]

Nos. 17,589-T and 17,590-T

UNDERTAKING FOR COSTS ON APPEAL

Know All Men by These Presents, the Saint Paul-Mercury Indemnity Company, a corporation organized and existing under the laws of the State of Delaware, and duly licensed to transact business in the State of California, is held and firmly bound unto General Accident Fire and Life Assurance Corporation, Ltd., a corporation, a Defendant in the above-entitled matter, in the penal sum of Two Hundred Fifty and no/100 Dollars ($250.00), to be paid to the said General Accident Fire and Life Assurance Corporation, Ltd., a corporation, their successors or assigns, or legal representatives, for which payment well and truly to be made, the Saint Paul-Mercury Indemnity Company binds itself, its successors and assigns, firmly by these presents.

The Condition of the Above Obligation Is Such, that

Whereas, M. W. Engleman as assignee for the benefits of creditors generally of Campagnola Food Products, Inc., a California corporation, has appealed or is about to appeal to the United States Court of Appeals for the Ninth Circuit, from a judgment dismissing the action entered July 5, 1956, in the above-entitled actions in the United States District Court for the Southern District of California, Central Division.

Now, Therefore, if the above-named Plaintiff, M. W. Engleman as assignee for the benefits of

creditors generally of Campagnola Food Products, Inc., a California corporation, shall prosecute said appeal to effect and answer all costs which may be adjudged against him if the appeal is dismissed or the judgment dismissing the action is affirmed, or such costs as the Appellate Court may award if the order is modified, then this obligation shall be void; otherwise to remain in full force and effect.

It Is Hereby Agreed by the Surety that in case of default or contumacy on the part of the Principal or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation, and award execution thereon.

Signed, Sealed and Dated this 30th day of July, 1956.

SAINT PAUL-MERCURY
INDEMNITY COMPANY,

By /s/ G. J. SANDEN,
Attorney-in-Fact.

Examined and recommended for approval as provided in Rule 8.

/s/ HARRY J. MILLER,
Attorney.

State of California,
County of Los Angeles—ss.

On this 30th day of July, 1956, before me, a Notary Public, within and for the said County and

State, personally appeared G. J. Sanden, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-Fact of and for the Saint Paul-Mercury Indemnity Company, Saint Paul, Minnesota, a corporation created, organized and existing under and by virtue of the laws of the State of Delaware, and acknowledged to me that he subscribed the name of the Saint Paul-Mercury Indemnity Company thereto as Surety, and his own name as Attorney-in-Fact.

[Seal] /s/ HELEN M. PAYNE,
Notary Public.

My commission expires June 11, 1960.

I hereby approve the foregoing bond.

Dated the 2nd day of August, 1956.

/s/ M. E. THOMPSON,
Deputy.

[Endorsed]: Filed August 2, 1956.

[Title of District Court and Causes.]

Nos. 17589-T and 17590-T

DESIGNATION OF RECORD ON APPEAL

To the Above-Entitled Court and the Clerk; and to the Defendants and Their Attorneys, Hindman & Davis:

The plaintiff and appellant hereby designates the portions of the record, proceedings and evidence to

be contained in the record on the appeal in the above action: [44]

1. Amended complaint.
2. Answer to amended complaint.
3. Second amended and supplemental complaint.
4. Written stipulation for answer to second amended and supplemental complaint.
5. Written stipulation dated April 4, 1956, together with order thereon.
6. Minutes of the court in the above-entitled action.
7. Judgment of dismissal.
8. Reporter's transcript of the evidence and proceedings at the pretrial hearings and at the trial.
9. Notice of appeal.
10. Undertaking for costs on appeal.
11. Any and all exhibits introduced at the trial.

August 1, 1956.

/s/ HARRY J. MILLER,

Attorney for Plaintiff and Appellant, M. W. Engleman, as Assignee for the Benefit of Creditors Generally of Campagnola Food Products, Inc., a California Corporation.

[Endorsed]: Filed August 2, 1956. [45]

In the United States District Court, Southern District of California, Central Division

No. 17,589-T

Honorable Ernest A. Tolin, Judge Presiding.

M. W. ENGLEMAN, as Assignee for the Benefits of Creditors Generally of Campagnola Food Products, Inc., a California Corporation,

Plaintiff,

vs.

GENERAL ACCIDENT FIRE AND LIFE INSURANCE CORPORATION, LIMITED, a Corporation,

Defendant.

No. 17,590-T

M. W. ENGLEMAN, as Assignee for the Benefits of Creditors Generally of Campagnola Food Products, Inc., a California Corporation,

Plaintiff,

vs.

INSURANCE COMPANY OF NORTH AMERICA, a Corporation,

Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff:

HARRY J. MILLER,

Beverly Hills, California.

For the Defendants:
E. EUGENE DAVIS,
Los Angeles, California.

Tuesday, February 21, 1956—9:10 A.M.

The Court: Good morning.

Mr. Davis: Good morning, Judge.

Mr. Miller: Good morning.

The Court: I took the files of these cases home with me last night to look through the usual statements which are required by the pretrial order, and there were no such statements.

Now, I don't mean to be unpleasant with you, but those statements have a very useful purpose to the court, and I know some of the judges here have just adopted the policy that if the plaintiff doesn't conform, that they will put the pretrial off calendar, and if the defendant doesn't conform and the plaintiff has done so, the case is continued and the defendant is given a few days in which to conform and is fined the plaintiff's costs of the day.

Now, I don't like to do that, but, Mr. Davis, I can't remember when you have ever complied with the pretrial order.

Mr. Davis: I think I have, your Honor. But this time—I just have been talking to Mr. Miller here, and we both agreed with each other, we have no excuse.

I think I have complied with your pretrial orders. You think I don't like them, but I do. This time we both of us have been so busy that all I can plead

is negligence and not [3*] disregard to the court's order.

The Court: Let's have the pretrial then as best we can. And I will ask you to settle a pretrial order after the hearing.

Except for amounts of money, aren't the issues the same in both cases?

Mr. Davis: Identical.

Mr. Miller: Identical.

The Court: What would you say those issues are, Mr. Miller?

Mr. Miller: May I answer the question by stating some of the facts?

The Court: Yes. Well, I gathered from the Complaint and Answer, and the interrogatories and the answers to the interrogatories, that this is a case in which the assured had some insurance with defendant, and then by telephone conversation ordered some more.

And he claims—this is the plaintiff's claim—the defendant says, "It isn't so." And the plaintiff says he ordered some more insurance and they sold it to him over the phone.

Within a very few days, and before any policy had been delivered, there was a loss. The defendant refuses to honor what the plaintiff says was the transaction.

You haven't smoked out, so far as my file shows, at [4] least, just why he doesn't honor it. Is it because of lack of agency or didn't the transaction

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

as claimed by the plaintiff even happen with the agent?

Mr. Miller: First, your Honor, there are two basic problems in the case. What I say with reference to the policy of the General Accident Company applies to the Insurance Company of North America. One policy of $11,000.00 was actually issued by the General Accident. There was one policy for $12,000.00 actually issued by the Insurance Company of North America. And there is no question as to the loss occurring, that the destruction occurred.

Now, neither one of those policies have been paid, although I respectfully submit that it is a case of clear liability on those policies. The proofs of loss were submitted in October, 1954.

Now, in addition to that is the cause of action that your Honor has referred to, that there was an oral extension, an oral contract of insurance within a few days of this loss. Other companies honored their obligation. These two companies in this case refused to honor the obligation.

Now, it seems to me that we should get either some clear admission, and to eliminate any issue of the case, as to the policies that were actually issued and some explanation as to why there is nonpayment.

The pleadings admit the issuance of the policy. They [5] admit the destruction of the equipment that was insured by the policy. They admit that we, the plaintiffs, duly performed all conditions required by the policy. Those are admissions in the

Answer. They admit that the rights of the insured were assigned to Mr. Engleman, who is the Credit Managers Association, for the benefit of the creditors.

Now, there is some denial that the policy was in full force and effect to the commencement of the action. What they mean by that we don't know.

The Court: Well, let's find out. What do you mean by that, Mr. Davis?

Mr. Davis: I don't recall the denial that counsel has in mind. If it is a denial, it is just a denial in the language of his Complaint.

I think substantially what counsel says is true here. But, as your Honor knows, I did my best by a motion to make more definite, to get him to say what he wants.

I want to find out if he has two causes of action here. We have no defense on the contracts as written.

The Court: Well, then, why haven't you paid them?

Mr. Davis: Because we have no way of paying them. He hasn't separated them. He says, in effect, this contract was amended. If he stated in separate causes of action he would have been paid a long time ago.

The Court: As I read it, he says there was a new [6] contract by which his client acquired new insurance, in addition to that which is admitted by your client. I could get that much out of it, without having even the clerk's file, my file not being a complete one.

It just looks as if this insurance company—I don't know what the fact is—said, "Well, we won't pay that about which there is no question. And being beaten down by the disaster, the poor man will make a settlement with us for less than we owe on the other."

Mr. Davis: No, your Honor, that isn't true, because we will not make a settlement on—there was no other contract. That is our position. We are not beating him down. After all——

The Court: That would be the effect of the action, wouldn't it?

Mr. Davis: Not a bit, no.

The Court: In many instances?

Mr. Davis: If he has two causes of action, as he says now, why, if he will state them separately we will make our admissions on the first cause of action and the second.

There is involved the question of the amount of loss, but that is a minor question.

Mr. Miller: May I address the court?

The Court: Yes.

Mr. Miller: A motion to make more definite was made [7] and granted, and we filed an amended complaint answering every point that was involved.

Now, there was no question of stating separate causes of action. And since you admit the facts as to the main policy, why not pay it off so we can get the admitted sums on this thing?

Mr. Davis: I told you just a while ago we will pay that any time you state these are separate; state in court or any time.

Mr. Miller: We state now they are separate and the pleadings state that, separate policies were issued. I don't know what——

Mr. Davis: I don't mean separate as to the companies. I mean separate—well, that isn't the way I read your pleadings.

If it is so stated, that you are counting upon a distinct and separate cause of action on these alleged oral contracts, then you have separate and distinct causes of action and we will treat them as such. The ones upon which we have no defense we will pay.

Mr. Miller: You have already admitted the allegations as to the main policy.

Mr. Davis: I know, I know. But you come right along and say, inferentially, that that policy was amended, although you do state it was another transaction. That is the only [8] way I can read this Complaint.

Mr. Miller: This is the first time, counsel—since this action has been pending, a year and a half—on a motion to make more definite that point wasn't even made. It is admitted that the policy was issued, the loss has occurred. Your own adjusting company has found the value to be way in excess of the policies involved here, on the matter of values.

I don't see why you should not pay at least the face amount, the admitted amount of the policy now, plus interest from October, 1954.

Mr. Davis: That is one reason why, you have never asked us. You have asked us to pay twice what we owe, that is all.

Mr. Miller: I beg your pardon. The request has been made by Mr. Engleman's office, by the adjuster representing the Credit Managers Association, it has been made by me of your prior associates in this matter here. Why don't you pay off and eliminate as an issue from this case the question of the main policies which are admitted, and leave open only the issue of the oral contract of insurance and whether there was an oral contract of insurance.

Now, that has been gone into. It seems to me that we are taking up unnecessarily the time of the court in arguing the original policy and whether or not there is liability on it, when it is admitted by you that there is liability.

Mr. Davis: I have admitted there is liability on that, [9] original policy. If you will, by any sort of stipulation, separate it from the other——

Mr. Miller: I propose now, to eliminate any issue in consideration of immediate payment to the plaintiff, to stipulate that the original policy in each case is separate and apart from the oral contract of insurance.

Mr. Davis: I will accept that stipulation, and our issues will be made upon that basis.

Mr. Miller: May we expect, in accordance with our statement, the statement I have made, that a check will be forthcoming on the original policy.

Mr. Davis: There isn't any question about it. The insurance company isn't making any money by holding that check. It is set up in their reserves. They can't do anything about it.

Mr. Miller: I submit your Honor's observation at the outset is the correct one of what has happened here. Unless we would have given up our rights on the oral contract of insurance, we could not collect from them on the matter of the original policy.

Mr. Davis: Nobody ever made any such suggestion to you.

The Court: That difficulty is out of the case. I suppose Mr. Davis felt that by paying on the uncontested one some judge might feel he was admitting some part of the contested.

Mr. Davis: No, your Honor. I say that money is of [10] absolutely no use to the insurance company, once they set it up as a reserve.

Mr. Miller: May I inquire, counsel, I think that the pleadings admit that the plaintiff duly complied with all the conditions of the policy, and the proofs of loss were submitted in October——

Mr. Davis: That is as to the written contract.

Mr. Miller: As to the written contract.

Mr. Davis: Yes.

Mr. Miller: And those were submitted in October of 1954.

Mr. Davis: I am willing to make that stipulation. It does us no good whatsoever to hold that money. We would like to get rid of it.

Mr. Miller: All right. The date, as I understand it, was on or about October 6, 1954, that our proofs of loss were submitted.

Mr. Davis: I don't know.

Mr. Miller: We submit that under the law, and you are willing to stipulate forthwith, there will be

paid to us the $11,000.00 from the General Accident, the $12,000.00 from the Insurance Company of North America.

Mr. Davis: Whatever those figures are.

Mr. Miller: And also it seems to me that under the law, you yourself participate in making, that we are also entitled [11] to the lawful rate of interest from October, 1954.

Mr. Davis: No. I think you are entitled to 60 days from the date of the ascertainment or the agreement of the amount of loss.

Mr. Miller: I would like to cite the very case that the court ruled against you on where the same point was made recently.

Mr. Davis: I will say this to the court, we will have no controversy over interest. You and I can agree on it. We are not going to fight about——

Mr. Miller: Let's have the date fixed.

Mr. Davis: You cite your case then.

Mr. Miller: You said about the date. Let's agree upon the date now, so we will eliminate that as a controversy.

Mr. Davis: My view and statement of the law is that it is 60 days from the ascertainment—after the filing of proof of loss, 60 days from the ascertainment of the amount, either by agreement or appraisal. That is the language——

Mr. Miller: What date would you say is now, so that we don't have any question as to that? We might even make a waiver, in order to avoid some of these questions, if you will tell me the date from which you claim interest should run.

Mr. Davis: Without studying this I can't state it, but I see in here a copy of a proof of loss. There is an endorsement [12] on there, "Received October 6, '54."

Mr. Miller: That is correct.

Mr. Davis: I am going to assume that that proof was prepared by the companies' adjuster after an agreement. If that is incorrect, I am not going to stipulate.

My assumption is that the agreement was arrived at simultaneously with the date of the filing of the proof.

Mr. Miller: I don't know about any agreement. All I do know is that the General Adjustment Bureau, engaged by your compaines, found specifically that the sound value of all the property destroyed was in excess of $90,000.00.

Mr. Davis: Here is the proof of loss. The sound value is $91,000.00, and the loss and damage $113,000.00—loss and damage $91,000.00, and sound value a hundred thirteen.

Do you have any date as to when this agreement —when they agreed upon the amount of loss?

Mr. Miller: That was prior to October 6, 1954.

Mr. Davis: Well, I am assuming that. I am assuming, that it was simultaneous.

Mr. Miller: I think I have a photostatic copy of the agreement, and I know I can tell you I prepared the proofs of loss, and I was called into it only after the controversy arose. That was only after the General Adjustment Bureau representing

your companies found the sound values to be in excess of $90,000.00. [13]

Mr. Davis: Counsel, did you prepare the proof of loss?

Mr. Miller: I prepared the proof of loss. In other words, I was engaged in this matter when it was apparent the claim was being denied.

Mr. Davis: This proof of loss seems to be upon a form of the General Adjustment Bureau, and this proof of loss——

Mr. Miller: To eliminate any question, what we are discussing now is the date from which interest runs?

Mr. Davis: That is right.

Mr. Miller: What do you suggest the date would be that would be agreeable with you, Mr. Davis?

Mr. Davis: I asked you, do you know when the amount of loss was agreed upon?

Mr. Miller: Prior to October 6, 1954.

Mr. Davis: Are you sure of that?

Mr. Miller: That I am sure of.

Mr. Davis: Say that interest would run from 60 days after that. That would be October, November, December 6th.

Mr. Miller: I have no objection, without going into any facts——

Mr. Davis: I am stating the law.

Mr. Miller: ——to stipulate then that the interest should run from December 6, 1954, to eliminate any question about the matter.

The Court: As what rate of interest? [14]

Mr. Miller: The lawful rate of interest is seven per cent.

Is that agreeable?

Mr. Davis: That is agreeable to me.

The Court: Then that is removed from the controversy.

Mr. Davis: Months and months and months ago —I am sorry?

The Court: That is removed from the controversy.

That leaves us, as I have gathered from the pleadings, the validity of the oral contract of insurance.

Mr. Davis: Now, this stipulation I am making is on the basis of the statement counsel has made, that these are separate and distinct contracts that he is suing on.

Mr. Miller: That is correct.

Mr. Davis: One on the written contract and one on the oral contract.

Mr. Miller: That is correct, sir.

Mr. Davis: That is the stipulation.

Mr. Miller: That is right.

Mr. Davis: So that will not arise in the future.

The Court: What is your contention as to the oral contract, Mr. Miller, your factual contention?

Mr. Miller: Well, our contention on the oral contract is that the orders were placed for insurance. That they were placed through a Mr.—through an insurance broker who was [15] representing these companies. These companies accepted the insurance. They didn't turn it down. And the first that they denied any liability was after they

learned—it had been reported to them that the fire had occurred.

The Court: They didn't deliver any policy?

Mr. Miller: No. It was a period—this all happened, I believe, your Honor, within a period of five day prior to the loss, from August 3rd to approximately the night of August 7, 1954. In other words, the entire transaction occurred in that short period of time. There was no policy delivered at all.

The insurance was placed with the brokers, and with other compainies at the same time. The other companies all honored the obligation and paid off. These two companies denied liability on the oral contract of insurance.

The Court: What is the question? Why is there a denial of liability?

Mr. Miller: I don't know, your Honor.

Mr. Davis: I think Mr. Miller should know. First of all, counsel—I don't know what relevancy he has, but there was one other company on this and that other company actually did accept and agree to accept the additional amount. These two companies——

The Court: What is the name of that other company? I am going to put my fire insurance with them. [16]

Mr. Davis: They had already—they had completed their contract before the fire. That is Insurance Company of the State of Pennsylvania. Incidentally, a client of mine. So they are not all no good, just because I represent them.

These two companies, one of them turned the

broker down. The other—this transaction happened over a week end. I mean, this broker endeavored to place additional coverage. One company turned them down cold. The other company did not—the man in charge did not even hear of it until after the fire. He heard of the transaction and the request of the broker for additional coverage after the fire, of which the broker was well aware.

The one company that didn't even hear of it was overlined, as they say, and could not write any additional fire insurance upon this particular line. The other company, by its special agent, called and left word and said, "No, we cannot accept any additional insurance."

Those are the facts as developed from our side of the case; in other words, just trying to force a contract on us.

Mr. Miller: I welcome the statement by counsel. It is the first time that I have learned the basis of denial of liability on the oral contract of insurance.

Will you state, Mr. Davis, who these gentlemen are that you have referred to?

Mr. Davis: You mean—— [17]

Mr. Miller: The men you have mentioned on your statement.

Mr. Davis: Yes, counsel. I would rather not do it from memory. You say you want to take some depositions?

Mr. Miller: Yes.

Mr. Davis: I will be very glad to have you do it; just as I wish to take the deposition of Mr.

Esperseda. I will furnish the names. I would rather not try to do it from memory.

Mr. Miller: I would like to take the depositions of all the persons connected with the defendant insurance companies who had anything to do with, from the inception of the communication from the brokers, to the conclusion of the matter.

Do I understand you will furnish those names to me?

Mr. Davis: I will be glad to do it.

Mr. Miller: Thank you.

May I suggest, your Honor, in view of counsel's offer, that it might be appropriate here if the pretrial be continued to some later date, to enable counsel, in view of Mr. Davis' statement, to take depositions on this matter.

The Court: You haven't propounded any interrogatories, either, have you?

Mr. Miller: We have them ready to go out today, your Honor.

Mr. Davis: Well, you are asking for the [18] names——

Mr. Miller: Yes.

Mr. Davis: Well, I will furnish them.

The Court: To what date would you suggest the pretrial be continued?

Mr. Miller: I would say—are you prepared to take the depositions immediately, Mr. Davis?

Mr. Davis: No, I would rather not take them this week. I am terribly busy. Otherwise, I wouldn't, as the judge thinks, have ignored his pretrial order.

Mr. Miller: Will you kindly state when it would

be convenient for you to submit all these employees and representatives for depositions?

Mr. Davis: Yes. And I would have to review this a little more. I would say there couldn't be over two out of each company, and I think they are here in Los Angeles and available.

You are talking about my own convenience?

Mr. Miller: That is correct, sir.

Mr. Davis: Say a couple of weeks from now.

Mr. Miller: It is agreeable to us.

Mr. Davis: I will take your man's deposition, Mr. Esperseda.

Mr. Miller: He is not my man. I represent the plaintiff. I will stipulate to his deposition. You get him available and I will have the Credit Managers Association call him. [19] We have no jurisdiction.

I am willing to stipulate—I will waive notice and everything else on a date and time and place for the taking of his deposition. You, however, will have to arrange to get him here, and I will co-operate.

Mr. Davis: I assume you will aid me in locating him?

Mr. Miller: I will assist you.

Mr. Davis: I did prepare a notice to take deposition, and I turned it over to one of the boys. I find in the file that it says the man can't be located.

Mr. Miller: The pressure is off of us, so long as your companies have stipulated on the basic policies, with interest, and will pay those sums. I assume that they will be paid within 30 days.

Mr. Davis: Easily.

Mr. Miller: All right. I suggest you——

The Court: Would Monday, the 5th of March, be an agreeable time for the further pretrial?

Mr. Miller: I would suggest, in view of counsel's statement, your Honor, we have about ten days after the depositions have been concluded, and, therefore, I would suggest 30 days' continuance from the present time.

Mr. Davis: Yes, I would, too.

The Court: Well, the present time is the 21st of February, isn't it? [20]

Could we make it the preceding Monday. I try to accumulate these things, where we can, on Mondays, because of the difficulty of keeping——

Mr. Miller: What date would that be, sir?

The Court: That would be the 19th.

Mr. Miller: That is agreeable to me, so long as we can conclude the taking of the depositions of Mr. Davis' clients and employees at least five days prior to the pretrial date.

Mr. Davis: You suggest Monday, the 19th?

The Court: Monday, the 19th of March.

Mr. Davis: If you don't mind, could we have at least another week?

Mr. Miller: That is agreeable.

The Court: Another week gets into a period in which I have been assigned to sit in another division. I will be gone for a month.

What I would like to do would be to get all the pretrial, those matters out of the way, so that we can try this case the latter part of July.

Mr. Miller: When does your Honor intend to leave?

The Court: I intend to leave—well, I am to start in the other District on the 26th.

Mr. Miller: And you are due to return when, sir?

The Court: I am due to return approximately a month later. Well, it would be the end of April. [21]

Mr. Miller: May I suggest, so that counsel at the next pretrial hearing will have complied with all pretrial orders and concluded their discovery proceedings, that the matter to go over to the point when your Honor will return from the other division?

The Court: All right. That would be Monday, May 7th.

Mr. Miller: Is that all right, Mr. Davis?

Mr. Davis: Yes, I think that is all right.

The Court: Monday, May 7th, let's say 11:00 o'clock, and then we will get the short matters out of the way first.

Mr. Davis: At what hour, your Honor?

The Court: 11:00 o'clock, May 7th, for further pretrial.

Mr. Miller: Is there any necessity for me or counsel preparing any order between now and May 7th, your Honor?

The Court: No, no order, but please send in some memo of law which will support your respective positions before that May 7th date.

Mr. Miller: It will be done substantially before that, insofar as the plaintiff is concerned.

Mr. Davis: I don't think we will have much

trouble on the law. It is going to be a question of fact here.

Mr. Miller: Thank you, your Honor.

(Whereupon, at 9:40 o'clock a.m., Tuesday, February 21, 1956, an adjournment was taken to Monday, May 7, 1956, at 11:00 o'clock a.m.)

* * *

Tuesday, June 19, 1956, 10:20 A.M.

The Clerk: 17,589, M. W. Engleman v. General Accident and Fire Insurance; 17590, M. W. Engleman v. Insurance Company of North America, for consolidated jury trial.

Mr. Miller: Ready for the plaintiff, your Honor.

Mr. Davis: Read for the defendant, your Honor.

May I ask, has there been a formal order of consolidation for the trial?

Mr. Miller: There was an order made by your Honor earlier in this case for consolidation.

If there is any question, I am prepared again to stipulate.

Mr. Davis: No, no.

Mr. Miller: I assume it is agreeable to you, Mr. Davis.

Mr. Davis: Certainly. I want it for the purpose of the record.

The Court: I understood there was one. But it is always well to have these things clear in everyone's mind at the beginning.

If there isn't a formal order, the court now makes

one. For the purpose of trial the cases will be tried together.

Are the jurors present?

The Clerk: Yes, 21.

(Whereupon, a jury was duly impaneled and sworn.) [79]

The Court: Now, in the trial of lawsuits we have some rules of law which are rather strict regarding jurors, and you are asked to comply with all of those, which are now pointed out to you.

It is necessary that jurors do not discuss the case. That means, don't talk to your family about it, your neighbors, friends or anyone. You don't talk to each other about it. You just keep your observations to yourselves, until the case is finally submitted to you. After it is finally submitted to you, of course, then you discuss it at considerable length.

Jurors are often a little uncertain as to what to do. You go into one of the restaurants nearby and you sit up at the counter and find some litigant or attorney in the case is at the next chair. Can you say, "Good morning," or are you expected to snub them? You are not expected to snub anyone unless you want to.

But you are expected to not engage in extended conversation with anyone. If anyone connected with the case undertakes to engage in extended talk with you, or even brief talk, if it concerns the case, you are to report it to the judge. Such action on their part constitutes contempt of court.

But it is expected that the usual courtesies of

passing the time of day will not be forbidden to you just because you [80] are on the jury.

Now, ordinarily in cases of this kind both sides have friends, sometimes investigators or associates, who will come around near the courtroom, and there is a lot of conversation in the halls about the case.

So in order that you are insulated from hearing those conversations which they will naturally be conducting here, the jury is requested on coming to the building to go directly to your jury room, and not stand around the halls in the building.

When you leave, please leave the building and don't stay about or you might hear some things which are not intended for your ears.

Now, those persons who were called here for jury today and have not been impaneled in this jury, we thank you for coming in.

When should they return?

The Clerk: When notified.

The Court: You are excused until the clerk notifies you of a new date on which your services will be required. You can stay and listen to this case if you want to, but you don't have to.

At the outset of a lawsuit the court generally calls on the attorneys for opening statements. These statements are not evidence, but they are an opportunity for the lawyers [81] to tell you what the case is about so you will better be able to understand what they are getting at with the various witnesses or documents which do come into evidence later.

So the court calls upon plaintiff's counsel to make

an opening statement now, unless you wish to waive it.

Mr. Miller: I trust that the court will permit counsel to abbreviate some of the terms here. Instead of using the full name of the General Accident Company, may I be permitted to use the name General Accident?

The Court: Surely. You do whatever you think will best present your case.

Mr. Miller: Thank you. Then I will, in my argument or presentation of the case or opening statement, refer to the defendant General Accident Company merely as General Accident.

And in the case of the other defendant known as Insurance Company of North America, I will merely refer to them as North American.

Insofar as the company Campagnola Food Products, Inc., are concerned, I will refer to them as Campagnola, in the interest of brevity.

I will merely try and outline what the plaintiff hopes to present to the jury. The Campagnola Company was a food processor, a cannery, which had a great deal of equipment.

In this particular case it is admitted by the pleadings there was an insurance policy actually written by General [82] Accident in 1952, in favor of Campagnola, for $11,000.00, and that in the same year North American had issued a written policy for $12,000.00 The policies remained in effect at all times.

Now, in August, 1954—that is a very important period in this lawsuit—we hope to show that on

July 30, 1954, there was a request on behalf of Campagnola for increased additional insurance. That that request was made to Charles Richard Love, and the evidence will show that he at least had signed as agent for the General Accident on the initial policy that was issued.

The evidence will show that that July 30, 1954, was on a Friday, and that the following Monday, August 2nd, Mr. Love put in a request in writing, a memorandum, he sent a memorandum to at least these two companies, General Accident and North America, to increase their line of insurance.

In the case of General Accident, to increase theirs from $11,000.00 by an additional $14,000.00, so it would be a total of $25,000.00. That was mailed and was received by General Accident.

The evidence will show that General Accident claimed they received that on August 4, 1954, on a Wednesday.

Now, at the same time there was mailed a memorandum to North American, over the name of Mr. Klee, asking them to approve, or whether they would go for an increase from [83] $12,000.00, by an additional $15,000.00, to a total of $27,000.00 worth of insurance.

The evidence will show that Mr. Klee was at all times a general agent, operating under a written general agency agreement from both General Accident and North American Companies, for those companies, with the power to bind the companies and issue policies.

And that Mr. Love was in his office and was

authorized to and was acting with his knowledge and consent in all things that he did in connection with this matter.

We hope to show that there was no communication at all from General Accident to Mr. Klee or Mr. Love, in his office, that the General Accident would not go for the increased line of insurance. And there was no communication from North American to Mr. Klee or Mr. Love or anyone else in that office, that they would not go for the increased line of insurance.

I neglected to mention the memorandum that went from Mr. Love and Mr. Klee to these companies, that said, "Advise immediately."

We hope to be able to show that the custom in the insurance business was or is, or was at the time of this incident, when a general office requests "Advise immediately," that unless the company does advise that it doesn't want the incresaed line of insurance, that the agent is permitted to [84] go ahead and accept the liability for the company. That is what happened in this case.

Unfortunately, on the night of August 7th, on a Saturday night, up to which time there had been no communication of any kind from either one of these companies to the general agent, there was a fire in which there was a complete loss. And it is admitted in this case that the loss was substantially in excess of $90,000.00, and more than is involved in the insurance in this case.

The evidence will show that the companies, after the fire, declined to issue any formal enforcement

clauses of any kind, and refused to pay not only the increased insurance——

Mr. Davis: The court please, I am going to object to this. Counsel stipulated that controversy over the written policy, or the delay in the payment of the witten policy would not be in any manner adjudicated or——

Mr. Miller: Our stipulation is on file.

Mr. Davis: And the oral stipulation is also part of the record. It is one thing we had our controversy over. It is not proper.

The Court: That is true, Mr. Davis, but it is impossible to appreciate a particular factual situation unless you have it in its natural setting to the other transactions which immediately surrounded and are related to it. It is understood [85] that Mr. Miller is not giving testimony. It is understood that there is no controversy in this particular area.

I will ask you not to argue, Mr. Miller, but you may explain what you are going to show here, so that the jury will understand the evidence as it comes in.

Mr. Davis: I want to make an objection to making any reference to the delay in payment on the written policies as wholly irrelevant and immaterial and contrary to the court's order in setting the issue and contrary to the order and written stipulations.

Mr. Miller: May I address the court?

The Court: Just carry on your opening statement, but do so very prudently and don't get into any prohibited areas.

Mr. Miller: All right, your Honor. The evidence, as I say, will show that the General Accident and the North American didn't pay either the face amount of the oral policies of $11,000.00 and $12,000.00, or the increase——

Mr. Davis: I object again. Counsel is diregarding the court's admonition.

Mr. Miller: May my statement be read to the court?

The Court: Yes. I was giving an instruction to my secretary.

(The record was read.)

Mr. Miller: I am merely following your Honor's suggestion [86] of giving a narrative, without an argument. I am not going to dwell on it. I have to give the background.

Your Honor indicated I could proceed without arguing the point or dwelling on that fact.

Mr. Davis: I will take my exception.

The Court: Your exception is noted.

Mr. Miller: I have already made the statement of what they didn't do. And after those proofs of loss—and it is admitted in this case—were filed and everything that was required to be done on behalf of Campagnola, the insured, was done, that thereafter this lawsuit was filed, not only to recover on the insurance policies——

Mr. Davis: Again, your Honor, I am going to object. He says "not only to recover on the insurance policies."

Will the court explain to the jury that he has so intermingled his two causes of action that we had to make motions and the written contracts were paid and eliminated from this case, and it was one of the very things I warned your Honor was going to happen here.

The Court: That have been paid?

Mr. Davis: They have been paid.

The Court: They have nothing to do with this case at this time?

Mr. Davis: They have nothing to do with this case at this time. [87]

The Court: I think the history of the contended policies—we don't know whether they existed or not. Mr. Miller says they do and you say they do not.

The history of those, if they involved other transactions, those transactions might be brought in as background.

The jury will understand there is no argument on policies which had previously been issued. I don't think we should dwell unduly on it.

Mr. Miller: I don't intend to.

Mr. Davis: They are not in issue.

The Court: And they are not in issue.

Mr. Miller: Now, I think the evidence, and it is without controversy in this case that there was an assignment from Campagnola Food Products, Inc., to Mr. Engleman, as the court indicated, as an assignee for the benefit of creditors generally in this suit, and Mr. Engleman, as such assignee, has filed this lawsuit.

I think with that, your Honor, I have concluded my opening statement to the jury. [88]

The Court: Do you wish to make an opening statement, Mr. Davis?

Mr. Davis: Yes, your Honor. I think it would be well at this time.

Ladies and gentlemen of the jury, I will try not to repeat what cousel has said or to engage in any argument.

I think it might be wise for—an aid in following the evidence for me to state the matters that we admit.

There were, as counsel has stated, prior to this transaction, out of which this lawsuit arises, in existence two policies of insurance, one written by the defendant the Insurance Company of North America—and I might state there are two suits here, one against the Insurance Company of North America and another suit against the General Accident, which had been consolidated for trial.

This one policy with the Insurance Company of North America was in force at the time of this transaction and at the time of the fire, which occurred within a few days after the transaction, which I will relate. That policy was in the amount of $1,200.00—$12,000.00. There was also a policy of insurance in effect with the General Accident, which was in the amount of $11,000.00. Those policies are not in issue, other than as explaining this other transaction.

Now, Richard Love was not an agent of either of these insurance companies; Mr. Klee was. [89]

We will show—I think the evidence will show that Mr. Love was a broker and had for several years prior to the fire and to this transaction handled the insurance of Campagnola, the plaintiff's assignor. We admit the assignment. There will be no necessity of any proof on that. I mean the assignment from Campagnola Food Products, Inc., a corporation, to Engleman as assignee for the benefit of creditors of Campagnola Food Products.

On the 5th day of August, 1954, there was received in the office of the defendant Insurance Company of North America and referred to their special agent Mr. Don Sparks a written letter on the letterhead of Love Insurance Agency, 510 West 6th Street, Los Angeles, California, and addressed to the "Insurance Company of North America, attention of the Fire Underwriters" or "Und."

Then "Subject: Campagnola 61296.

"Date 8-3-54," the 3rd day of August, 1954, and received in the office, so far as our evidence will disclose—and we have been able to determine—on the 5th day of August.

This letter was, as I say, on the letterhead of Love Insurance Agency and was as follows:

"Will you endorse to increase your line to $27,000.00 part of total line of $88,000.00. Advise immediately."

Then in typewriting was signed the name of "K. H. Klee." [90]

Testimony will show that Klee did not send the letter: that Love sent it. This document was referred to Mr. Sparks as being in his line of duty on

August 5th when it was received, and he immediately telephoned to the chief underwriter of the Insurance Company of North America at San Jose, where the books and records and——

Mr. Miller: May I interrupt to object, your Honor? I think counsel is going into subject matter that is absolutely hearsay, and we are going to object to this line of testimony of self-serving proof to be introduced.

I feel at the present time a statement by counsel along the line or incompetent testimony is not proper.

Mr. Davis: We expect to prove that and will show it as the reason for the declination of the risk. And we will have a right to show it; and I have a right to make my statement——

The Court: If there was a declination, you may show that. Why they accepted or why they declined is not material.

Mr. Davis: I will accept the ruling of the court because I expect I will make the same kind of objection to counsel.

All right. At any rate, for the present—I will, your Honor, offer this proof when the time comes.

Mr. Sparks telephoned to the chief underwriter of the Insurance Company of North America at the head Pacific Coast office in San Francisco, to get data on the risk and the——

O.K. Go ahead and object. If I can't say that, I can't [91] say anything.

Mr. Miller: I submit, your Honor, it is along the same line as before. It is inadmissible, and I

suggest that counsel defer on that subject matter until he is ready to make an offer of proof and our objections can be properly presented to the court.

Mr. Davis: I am trying to tell this jury exactly what happened. I think I have what we expect to prove happened.

The Court: I don't know that you are going to get it in, Mr. Davis.

Mr. Davis: Very well then.

The Court: The courts are generally liberal on these opening statements. You can't tell at this stage what the court will ultimately rule on the admissibility of certain evidence.

Mr. Davis: Very well.

The Court: Hence it is just as well if you don't——

Mr. Davis: O.K.

The Court: ——either side go too far on the declaration of what the proof will be when it is within the disputed area of relevancy.

Mr. Davis: Very well. Mr. Sparks, under those jurisdiction this matter fell, determined that he would not accept this risk or this increased insurance.

He immediately called—not knowing Dick Love or knowing [92] who he was, he called the Klee Agency. Somebody at the Klee Agency informed him that this Campagnola business was Dick Love's business.

He asked for Dick Love. Dick Love was not in.

Later Dick Love called him and he was not in, and he left word. He called Dick Love again and,

as I recall, and the evidence will show, no further communication passed between the parties. All this happened on the 5th and 6th of August.

On the 7th of August the property was burned. We will admit—we have admitted that the loss was in excess of the insurance that was actually in effect and in excess of the amount that would be on it if plaintiff's contention that these two oral contracts were in existence. In other words, the question as to amount of loss is not in issue.

The question as to the assignment to Campagnola, the question of the due performance of the terms and conditions of the contract by the furnishing of proof of loss and giving notice, are not in issue.

We admit all those things. That is with reference to both policies.

At any rate, after this proposal was made by Mr. Love in this letter to the Insurance Company of North America no communication, either accepting it or rejecting it, went back to Mr. Love prior to the fire. We will admit that, and we will— [93] that will be our proof.

Now, as to the General Insurance Company, on August 4th—before I come to that, Mr. Love had at one time been an agent for the General Accident. But I think—I don't know whether I have a note on it—but I think it was approximately two years prior to this episode that his agency was cancelled and the cancellation duly made a matter of public record by filing with the Insurance Commissioner. All that we will prove.

On August 4, 1954, there was received in the general offices of the General Accident a communication on the letterhead of Love Insurance Agency at 510 West 6th Street, Los Angeles 14, California:
"To: General Accident
"Subject: Campagnola 784651
"Attention: Blank
"Date: 8-3-54."

This is the communication:

"Will you increase your line by endorsement to $25,000.00 part of total line of $88,000.00. Advise immediately."

This document was placed upon the desk of Mrs. Bessel Fennama, fire underwriter for the General Accident, on the same day it was received, August 4th.

Mrs. Fennama, as she will express it, pulled the file, [94] that is, got the file out of the cabinet containing what they call the daily report, which will be explained to you as the company's copy and record of policy issued, another data on the file relating to the Campagnola risk. And she attached this letter to the file, this letter from Dick Love, and wrote on it as follows:——

Mr. Miller: Just a moment. We object to that, your Honor, along the same line as we have previously indicated, the statements are incompetent, self-serving. What they did in their own offices, without the presence of the plaintiff or insured, we feel is immaterial.

Mr. Davis: This document will be introduced in evidence. It has been——

The Court: Well, let's wait until it gets in evidence before bringing its contents before the trier of fact, because I think that what must govern the determination of this suit was whether or not the policies were contracted for and not what reasons might have motivated the company to either accept or to reject. Let's keep it as simple as we can. So the objection is sustained.

Mr. Davis: Very well, your Honor. I will accept that at this time. I expect, of course, to offer it.

At any rate, in the short period of time before this document was received and the fire there was no communication, no acceptance or no rejection. The matter rested, so far as [95] communications between the parties were concerned, as the letter received, "Will you increase your line by endorsement to $25,000.00 part of total line of $88,000.00. Advise immediately. Dick Love."

That is the transaction upon which we will ask this jury to return verdicts for both defendants.

The Court: We have 15 minutes. Can we get some evidence in during that time?

Mr. Miller: I would prefer, if your Honor would permit, that we adjourn at this time and convene earlier, if the court will permit.

The Court: Well, the difficulty with convening earlier, and we can do it sometimes, but the judges have a lot of people come to see them with all kinds of problems, as you know, and we have appointments continually with counsel. I just can't convene earlier that 2:00 o'clock today.

Mr. Miller: That is all right, your Honor. The

only thing is, with my initial witness, I didn't want to break in my preliminary examination.

The Court: Are we gong to be able to finish this case this week?

Mr. Miller: I anticipate that, as far as the plaintiff's case is concerned, your Honor, that we should be able to conclude the plaintiff's case today.

Mr. Davis: Then we will certainly finish this week, if [96] he completes the plaintiff's case today.

The Court: I recall the estimate was three days. What gives me concern is that since the case was set for trial the chief judge has ordered me to be in San Francisco on the 26th, and I just have to get this out of the way before the 26th. But we have ample time, apparently.

The jury will bear in mind the admonition which I gave you at some length.

Is it acceptable that the jury will be deemed admonished each time, without my physically doing so, or do you wish the jury to be admonished each time.

Mr. Davis: Yes.

Mr. Miller: Yes, we stipulate it be deemed the admonishment.

The Court: Consider it said each time we take a recess, even if I don't say it.

We will recess until 2:00 o'clock this afternoon.

(Whereupon, at 11:48 o'clock a.m., a recess was taken until 2:00 o'clock p.m. of the same day.) [97]

Tuesday, June 19, 1956. 2:00 P.M.

The Court: The jury is present.

I hope that during the afternoon counsel on both sides will submit their instructions.

Mr. Davis: I have mine now, your Honor.

Mr. Miller: I have already submitted mine to the clerk, your Honor.

The Court: Thank you, Mr. Davis.

Mr. Davis: I may have a few more, if I may submit them.

The Court: Yes. The earlier the better because it takes a little while for a judge to get them clear in his mind. I don't like to give instructions to the jury without having your suggestions long enough so that they have been given full consideration.

Mr. Davis: I had some prepared that I hadn't checked. I think probably that is all, unless something new arises in the case. I have a few more with me, but they were gotton out at noon and I will hand them in before we leave.

The Court: Thank you. Proceed.

Mr. Miller: Thank you.

Mr. Klee, will you please take the stand? [98]

KENNETH H. KLEE

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please be seated?

Your name, sir?

The Witness: Kenneth H. Klee.

(Testimony of Kenneth H. Klee.)

The Clerk: How do you spell that?

The Witness: K-l-e-e.

The Clerk: Thank you.

Direct Examination

By Mr. Miller:

Q. What is your business address, sir?

A. 510 West 6th Street, Los Angeles.

Q. Will you state what your telephone number is? A. VAndyke 1273.

Q. What is the nature of your business?

A. I conduct you might call it a retail business. I am an insurance agent and broker dealing with the public?

Q. How long have you been an insurance agent?

A. On my own for six years. Before that I was associated with other agencies.

Q. For how long?

A. Since 1940. That would be about 16 years.

Q. What is the name of your agency?

A. The Klee Insurance Agency. [99]

Q. How long has it been known as such?

A. Since its inception in January of 1950. That would be six years, six and a half years.

Q. Are you familiar with the General Accident?

A. Yes, I am.

Mr. Miller: Counsel, do you have the original agency agreement?

Mr. Davis: I have just run through here hurriedly. I furnished you a copy.

(Testimony of Kenneth H. Klee.)

Mr. Miller: I am asking for the original. But I have a photostatic copy.

Mr. Davis: Yes. Here is another photostatic copy.

Mr. Miller: This has been furnished to me through the Klee office. Do you want to take a look at it?

Mr. Davis: I haven't compared it. I assume it is the same as the one we have.

Mr. Miller: If you have the original, I will be glad to use the original.

Mr. Davis: I have no objection. That seems to be the same as this one.

The Clerk: Plaintiff's 1 for identification.

(The document referred to was marked Plaintiff's Exhibit 1 for identification.)

Q. (By Mr. Miller): I show you an agency agreement between General Accident and Kenneth Haskell Klee, d.b.a. [100] Klee Insurance Agency, bearing the date May 17, 1950, a photostatic copy, and ask you to compare it, sir.

A. (Witness complies.)

Q. Have you? A. Yes, I have.

Q. And since May 17, 1950, have you been an agent for the General Accident?

A. Yes, I have.

Q. And has that agreement that you have before you remained in full force and effect from May 17, 1950, down to the present date?

A. Yes, sir, it has.

(Testimony of Kenneth H. Klee.)

Q. Now, are you familiar with the company known as Insurance Company of North America?

A. Yes, I am.

Q. How long have you known of that company, sir?

A. Well, I have known of that company for many years. Our family office in Chicago represented them for probably 40 or 50 years. In a specific way I have been an agent of theirs. I don't know the exact date I signed the agency agreement, but probably four or five years out here.

Mr. Davis: That is the copy I furnished you, isn't it.

Mr. Miller: I think so.

The Clerk: Plaintiff's 2 for identification.

(The document referred to was marked Plaintiff's Exhibit 2 for identification.) [101]

Q. (By Mr. Miller): I show you an agency agreement bearing the date August 7, 1951, between Klee Insurance Agency and Insurance Company of North America, and ask you to please examine that.

A. All right, sir.

Q. And is that the agency agreement under which you have been acting? A. Yes, it is.

Q. Has that been in full force and effect since the date that it bears, of August, 1951?

A. Yes, it has.

Q. Down to the present date? A. Yes.

Mr. Miller: May we, your Honor, at the present

(Testimony of Kenneth H. Klee.)

time offer in evidence Plaintiff's Exhibit 1 and Plaintiff's Exhibit 2?

Mr. Davis: No objection.

The Court: Received.

(The documents heretofore marked were received in evidence as Plaintiff's Exhibits 1 and 2.)

PLAINTIFF'S EXHIBIT No. 1

(Admitted in evidence 6/19/56)

(Agent's Copy)

Agency Agreement

General Accident Fire and Life Assurance Corporation, Ltd.
U. S. Offices: Fourth and Walnut Streets, Philadelphia 6, Pa.

This Agreement made and entered into this 17th day of May, 1950 by and between the General Accident Fire & Life Assurance Corporation, Ltd., of Perth, Scotland, through its United States Branch at Philadelphia, hereinafter called the Corporation, and Kenneth Haskell Klee DBA Klee Insurance Agency and a corporation organized and existing under the laws of ....., having its principal office or place of business at Los Angeles, County of Los Angeles, State of California, jointly and severally, hereinafter called the Agent.

(Testimony of Kenneth H. Klee.)
Plaintiff's Exhibit No. 1—(Continued)

Witnesseth:

In consideration of the mutual covenants and agreements herein contained the parties hereto agree, as follows:

1. The Corporation hereby grants authority to the Agent in the following territory, viz.: Los Angeles, California, and Vicinity, to solicit and submit applications for the classes of insurance for which a commission is specified in the Commission Schedule which forms a part hereof; to issue and deliver policies, certificates, endorsements and binders which the Corporation may, from time to time, authorize to be issued and delivered; to collect and receipt for premiums thereon or therefor; to cancel such policies and obligations in the discretion of the Agent where cancellation is legally possible; and to retain out of premiums collected and paid in accordance herewith, as full compensation on business placed with the Corporation by or through the Agent, commissions at the rates set forth in said Commission Schedule.

2. A report of risks assumed shall be made to Southern California Br. Office daily. Accounts of money due the Corporation on the business placed by or through the Agent with the Corporation are to be rendered at the end of each month; the balance shown to be due to the Corporation shall be paid not later than the Last day of the Second suc-

(Testimony of Kenneth H. Klee.)

Plaintiff's Exhibit No. 1—(Continued)

ceeding month to the Southern California Branch office. Address 607-616 Spring Arcade Bldg., 541 So. Spring Street, Los Angeles 13, California.

3. In the event the Corporation shall, either during the continuance of this Agreement or after its termination, refund premiums under any policy by reason of cancellation or otherwise, the Agent shall immediately return to the Corporation the commission originally retained by him on the amout of the premium so refunded.

4. Any policy forms and other Corporation supplies furnished by the Corporation to the Agent shall always remain the property of the Corporation and shall be accounted for and returned by the Agent to the Corporation on demand. All accounting records of the Agent pertaining to the business of the Corporation shall be subject to inspection at any time by the accredited representatives of the Corporation.

5. The Corporation shall not be responsible for agency expenses such as rentals, transportation facilities, clerk hire, solicitor's fees, postage, telegrams, telephone, expressage, advertising, exchange, or any other agency expense whatsoever.

6. The Corporation reserves the right to cancel direct any contract of insurance at any time, but in the event of such cancellation the Corporation shall notify the Agent prior to giving notice thereof.

(Testimony of Kenneth H. Klee.)

Plaintiff's Exhibit No. 1—(Continued)

7. In the event of the termination of this Agreement, and provided the Agent has promptly accounted for and paid to the Corporation all premiums and other moneys or securities collected or held for or on behalf of the Corporation for which the Agent may be liable, the records of the Agent and the use and control of expirations shall remain the property of the Agent and be left in his undisturbed possession.

8. This Agreement supersedes all previous Agreements, whether oral or written, between the Corporation and the Agent, and may be terminated by either party at any time upon written notice to the other.

Signed, sealed and dated on the day and year first above written.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD.

By /s/ G. D. BLAND,
Ass't. Agency Superintendent.

Witness:
/s/ M. R. SHAW.
Agent.

Individual sign here:

/s/ KENNETH HASKELL KLEE,

Witness:
/s/ D. H. McCRONE.

(Testimony of Kenneth H. Klee.)

Plaintiff's Exhibit No. 1—(Continued)

Commission Schedule

		Per Cent
(a)	On Commercial Accident Premiums	25
(b)	On Commercial Health Premiums	25
(c)	On Automobile Liability Premiums	17½
(d)	On Automobile Property Damage Premiums	20
(e)	On Automobile Collision Premiums	20
(f)	On Public Automobile Liability Premiums	10
(g)	On Public Automobile Property Damage Premiums	10
(h)	On Automobile Liability and Property Damage Premiums (Long Haul Truckmen)	10
(i)	On Burglary Premiums	20
(j)	On DDD Policy Premiums	....
	Insuring Agreement	
	I Dishonesty	15
	II Inside	20
	III Outside	20
	IV Safe Deposit	20
	V Forgery	20
(k)	On Plate Glass Premiums	20
(l)	On Plate Glass Premiums (on the first $100 for one year or less)	....
	On Plate Glass Premiums (on all undiscounted Premium in excess of $100 for one year or less)	20
(m)	On Public Liability Premiums	25
(n)	On Property Damage and Collision Premiums other than Automobile	17½
(o)	On Employers' Liability Premiums	10
(p)	On Workmen's Compensation Premiums	10
(q)	On Automobile Accident Policies H-7 & H-11	30
(r)	On Student's Medical Reimbursement Policies	15
(s)	On Professional Liability Premiums	15
(t)	Fire Premiums—As per schedule Memorandum of Fire Commission attached	....

(Testimony of Kenneth H. Klee.)

Plaintiff's Exhibit No. 1—(Continued)

Commission Schedule

		Per Cent
(u)	Inland Marine Premiums	20
(v)	Automotive Fire, Theft & Comprehensive Premiums	25

Retrospective Rating—Except in States where the New Rating Program is Effective, and in Delaware, Pennsylvania and Utah, the Commission on Retrospectively Rated Business is Payable on the "Minimum" Premium Only.

Assigned Risks—No Allowance of Any Kind may be Paid for Workmen's Compensation Insurance Accepted under the Voluntary Plans in Effect in Various States.

PLAINTIFF'S EXHIBIT No. 2

(Received in Evidence 6/19/56)

Agency Agreement With Insurance Company of North America

This Agreement, made this 7th day of August, A.D. 1951, by and between Klee Insurance Agency of 510 West Sixth Street, Los Angeles 14, in the County of Los Angeles and State of California, hereinafter designated as "Agent," and Insurance Company of North America, a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania and having its principal office in the City of Philadelphia and State of Pennsylvania, hereinafter designated as "Company":

(Testimony of Kenneth H. Klee.)

Plaintiff's Exhibit No. 2—(Continued)

Witnesseth That:

Pursuant to request that the underwriting facilities of the Company be made available to the undersigned, as Agent, the Company hereby grants authority to Agent to receive and accept proposals for such contracts of insurance covering risks on properties located in State of California as the Company has authority lawfully to make; subject, however, to restrictions placed upon such Agent by the laws of the United States or of the state or states in which such Agent is authorized to write insurance business and to the terms and conditions hereinafter set out.

It Is Hereby Agreed between the Company and the Agent as follows:

(1) Agent has full power and authority to receive and accept proposals for insurance covering such classes of risks as the Company may, from time to time, authorize to be insured; to collect, receive and receipt for premiums on insurance tendered by the Agent to and accepted by the Company and to retain out of premiums so collected, as full compensation on business so placed with the Company, commissions at the following rates, viz.: This Company's scale of commissions as may be from time to time promulgated.

(2) In the event of termination of this Agreement, the Agent having promptly accounted for and

(Testimony of Kenneth H. Klee.)

Plaintiff's Exhibit No. 2—(Continued)

paid over premiums for which he may be liable, the Agent's records, use and control of expirations shall remain the property of the Agent and be left in his undisputed possession; otherwise the records, use and control of expirations shall be vested in the Company.

It is a condition of this Agreement that the Agent shall refund ratably to the Company, on business heretofore or hereafter written, commissions on cancelled liability and on reductions in premiums at the same rate at which such commissions were originally retained.

(3) Accounts of money due the Company on the business placed by the Agent with the Company are to be rendered monthly so as to reach the Company's office not later than the ..... day of the following month; the balance therein shown to be due to the Company shall be paid not later than Sixty (60) days after the end of the month for which the account is rendered.

(4) Company shall not be responsible for Agency expenses such as rentals, transportation facilities, clerk hire, solicitors' fees, postage, advertising, exchange, personal local license fees, adjustment by the Agent of losses under policies issued by the Agent, or any other Agency expenses whatsoever.

(5) Any policy forms, maps, map corrections and other like Company supplies furnished to the

(Testimony of Kenneth H. Klee.)

Plaintiff's Exhibit No. 2—(Continued)

Agent by the Company shall always remain the property of the Company and shall be returned to the Company or its representatives promptly upon demand.

(6) This Agreement supersedes all previous agreements, whether oral or written, between the Company and Agent and may be terminated by either party at any time upon written notice to the other.

In Witness Whereof the Company has caused its corporate name to be subscribed hereto and the Agent has set his hand and seal on the day and year first above written.

INSURANCE COMPANY OF NORTH AMERICA,

By /s/ JOE H. HEDEEN,
Special Agent;

/s/ KENNETH HASKELL KLEE.

The Court: Now, in this department it is our rule that whenever any document comes into evidence, either counsel may just take time to read it to the jury at the time, if you wish, or to have the jurors examine it. I don't mean you have to, but if it is desirable in order to present your [102] case in proper continuity you may read these exhibits as they are received.

(Testimony of Kenneth H. Klee.)

Mr. Miller: Thank you, your Honor.

The Court: Or such part of them as you think appropriate.

Mr. Miller: I desire to read to the jury from the agency agreement with General Accident, Paragraph 1, which reads as follows:

"The Corporation hereby grants authority to the Agent in the following territory, viz.: Los Angeles, California, and Vicinity to solicit and submit applications for the classes of insurance for which a commission is specified in the Commission Schedule which forms a part hereof; to issue and deliver policies, certificates, endorsements and binders which the Corporation may, from time to time, authorize to be issued and delivered; to collect and receipt for premiums thereon or therefor; to cancel such policies and obligations in the discretion of the Agent where cancellation is legally possible; and to retain out of premiums collected and paid in accordance herewith, as full compensation on business placed with the Corporation by or through the Agent, commissions as the rate set forth in said Commission Schedule."

I would like to read from the agency agreement with the [103] Insurance Company of North America and Klee Insurance Agency, Paragraph 1:

"Agent has full power and authority to receive and accept proposals for insurance covering such classes of risks as the Company may, from time to time, authorize to be insured; to collect, receive and

(Testimony of Kenneth H. Klee.)

receipt from premiums on insurance tendered by the Agent to and accepted by the Company and to retain out of premiums so collected, as full compensation on business so placed with the Company, commissions at the following rates, viz.: This Company's scale of commissions as may be from time to time promulgated."

Q. (By Mr. Miller): Now, in accordance with these agency agreements have you from time to time since 1950 acted as agent for General Accident under this agreement?

A. Yes, sir, I have.

Q. Have you also from 1951 from time to time acted as general agent for North American?

A. Yes, I have.

Mr. Davis: Just a minute. I object to that as calling for a conclusion of the witness. He said that it is admitted that he has his agency commission—agreement, and that it is not canceled.

But the question as to whether he has acted as an agent or acted as a general agent is a conclusion. I object to it [104] on that ground.

There is no question but that he was an agent within the powers granted him by this instrument, and the agreement has not been canceled. It is still in existence. Anything else, except drawn from the instrument, is a conclusion.

Mr. Miller: I want to show, your Honor, that he has acted as the agent under the agreement.

Mr. Davis: That calls for a conclusion.

The Court: Objection overruled.

(Testimony of Kenneth H. Klee.)

Q. (By Mr. Miller): Do you understand the question, Mr. Klee?

A. That I acted as an agent under the contracts?

Q. That is correct. A. Yes.

Q. Thank you. Now, have you in connection with your agency with these companies handled fire insurance? A. Yes.

Q. Now, I direct your attention to Mr. Charles Richard Love. Do you know him?

A. Yes, I do.

Q. How long have you known him?

A. Since early in 1950. Actually before that, when he was working for one of the companies, going back to about 1948.

Q. Now, has he been associated in your office in the [105] past five years? A. Yes.

Q. And in what particular office?

A. He left the company he was working for, I think, in the spring of 1950, shortly after I started, and occupied the desk across from mine in the same office.

In the intervening period of time we acted in a loose associate capacity, where we shared the telephone expense and where we shared the stenographic expense, and where, although we would each individually transact business for our own accounts, one would watch the business of the other was sick or on vacation, out of courtesy that the other would do the same for him.

In addition to that, generally we acted to help

(Testimony of Kenneth H. Klee.)

each other, although we did not pay each other commissions unless we worked on a case jointly. Generally speaking, we maintained our own entities.

Q. Do I understand that you used the same telephone service? A. Yes.

Q. And what about the other joint facilities in the office?

A. We had joint mailing, stamp collection, and everything else: We channeled our expense of stationery, because that was split into the two entities. But the other operating [106] expenses were handled on a joint basis.

Q. What about the secretarial help, sir?

A. She was hired by me and reimbursed percentage wise by Love month to month.

Q. Was this a condition that prevailed during 1954? A. Yes, it was.

Q. Now, during the period of years that Mr. Love was associated—he still is associated in your office, is he?

A. Since that time he has been working out of his home. He has a different phone number and he does come in to pick up his mail. But, bascially speaking, the setup now is where he runs his busness out of his house and we don't no longer have that same setup.

Q. But in 1954 you did have that setup, is that correct? A. Yes, that is right.

Q. Now, during 1954, did you have any discussions with the General Accident Company, or, 1953,

(Testimony of Kenneth H. Klee.)

with reference to Mr. Love handling business in your name through that company?

A. No, I didn't.

Q. When did you have any discussion with them? A. With whom, the company?

Q. With General Accident.

A. I have never had a discussion with them.

Q. Did you have any with North [107] American? A. Yes.

Q. When?

A. I wouldn't know the exact date. It was whenever this special agent called on us. This would be back probably about 1951, '52.

Q. And do you recall who that special agent was? A. Yes. His name was Joe Hedeen.

Q. Is that the Joe Hedeen who signed the agency agreement marked Plaintiff's Exhibit 2?

A. Yes. I am not familiar with the signature, but I don't think there is more than one working for the company.

Q. All right. And where did that conversation take place? A. In our office.

Q. Who was present at that time?

A. Dick Love, Joe Hedeen, myself, and probably my secretary at the time.

Q. What was said on the subject, please?

Mr. Davis: May the court please, I will object to this as incompetent, irrelevant and immaterial. There is no showing that Joe Hedeen had any authority to bind the defendant Insurance Company of North America.

(Testimony of Kenneth H. Klee.)

If it is an attempt to vary or change the terms or enlarge the terms of this written instrument, it cannot be done by parol testimony, and, certainly, so far as the record [108] now shows, Joe Hedeen had no authority, other than to enter into this agreement, under the terms and conditions which it bears. Any other conversation would be immaterial.

Mr. Miller: May I address the court?

The Court: Yes.

Mr. Miller: There is no attempt to vary any terms of any agreement. We are merely showing that the fact that Mr. Love was handling these things for Mr. Klee or in his agency, as a subagent, was brought to the attention of the company at that time.

The Court: Does your questioning go to just that?

Mr. Miller: That is all that I am interrogating this witness on.

Mr. Davis: The agreement does not permit the appointment of subagents or delegation of authority by this witness.

Mr. Miller: I challenge that.

The Court: Objection overruled. Let's not have more argument on this point.

Q. (By Mr. Miller): Do you understand the question, Mr. Klee? If you don't I will have it read.

A. Would you repeat it, please?

Mr. Miller: With the court's permission.

(Testimony of Kenneth H. Klee.)

(The question was read.)

Q. (By Mr. Miller): Would you like the preceding protion of that? [109]

A. Yes, the train of thought.

The Court: Read the witness enough of it so he can see the context of the question.

(The record was read.)

The Witness: In answer to that question, frankly, I don't recall, other than I was appointed as agent. Beyond that I don't recall any particular remarks one way or the other.

Q. (By Mr. Miller): I see. Now, do you recall, or, do you know Mr. Sparks?

A. No, I don't—I mean not prior to the trial, prior to this incident.

Q. I see. Now, directing your attention to Mr. Love, did you prior to August 2, 1954, authorize Mr. Love to place insurance or to act as your subagent in connection with General Accident?

Mr. Davis: Just a minute. I must object to that as incompetent, irrelevant and immaterial, and no authority being shown to appoint a subagent.

The rule of law is very definite, your Honor, that an agency, an insurance agency such as this is a fiduciary relationship and the powers cannot be delegated by the agent.

The Court: You mean the agent has to render all the acts of the agent personally?

Mr. Davis: He has to render all of the acts that

(Testimony of Kenneth H. Klee.)

call [110] for judgment or are binding on the company. He can employ others to do the ministerial or secretarial acts. It is a fiduciary relationship that can't be delegated. He couldn't delegate to Mr. Love authority to bind his principal.

Mr. Miller: I respectfully submit that is not the law, and what your Honor has pinpointed is the situation, that it isn't necessary for an insurance agent to handle every detail of his work. The right to appoint a subagent is clear, in the absence of any specific limitation against it, and there isn't any here.

The Court: Do you have any authority on that?

Mr. Miller: They have been appended, yes, your Honor, to one of the instructions submitted to your Honor on the subject. There are a number of cases, recent cases, in California on that subject.

The Court: Of course, the cases cited on your instructions are citing principles of law rather than instruction language. I think that I might be up against the proposition that your question here is asking for a conclusion, and that it would be better to ask for the details of what was said and done, and then the jury would be instructed as to the rules of law by which the quotum of proof is to be measured.

Mr. Miller: I will be glad to conform to your Honor's suggestion. I withdraw my question.

Q. (By Mr. Miller): Mr. Klee, will you tell us what has [111] occurred between you and Mr. Love with reference to his handling work under the general agency that you have with General Accident.

(Testimony of Kenneth H. Klee.)

Mr. Davis: May I make——

Mr. Miller: That goes prior to August 3, 1954.

Mr. Davis: May I make the same objection to that question as the previous one. I will add this suggestion to the court, that that still calls for a conclusion.

The Court: That objection is overruled.

The Witness: That statement of facts, as I recall them, Mr. Love, having a substantial volume of business, took his own agency agreement with General Accident. I had mine.

Subsequent to that time, apparently, his agreement with General Accident was terminated, and subsequent to the termination the insurance company put through some business on my agency records, without my knowledge or consent or objection.

I didn't frankly care, because in many instances I used his facilities, when we were using each other's facilities. And this was one of those instances.

Q. (By Mr. Miller): Well, when you use the term "facilities," will you please relate what you mean or what or what you meant by that term?

A. The way we operated since 1950, being new in the business, from a production standpoint, was that if we were [112] to each take a separate agreement with each other's companies the same volume of business we would have to offer wouldn't amount to very much. So that one of us would take the

(Testimony of Kenneth H. Klee.)

agreement and the other would—if he was going to have a substantial volume—put his business through the other person's name on a subagency basis.

If there wasn't a substantial volume we would put it through on a brokerage license basis.

Q. Was that true in the situation of General Accident?

A. In the situation with General Accident, Mr. Love had his own agreement when he originally wrote the Campagnola line, and apparently what happened——

Mr. Davis: Just a minute. I object to the witness testifying apparently what happened.

The Court: Yes. You will have to tell us what you observed, and if inferences are to be drawn from that it will be for the jury to draw them.

The Witness: Specifically what happened was that General Accident and Love renewed some business formerly placed through his name, renewed it through the Klee Agency name, or continued it.

Q. (By Mr. Miller): And did you observe that Love business reflected on statements you received from the General Accident periodically, with reference to commissions or premiums earned? [113]

A. Yes, that is correct.

Q. In other words, as the statements came through you could see that the General Accident had taken business——

Mr. Davis: I object.

Mr. Miller: May I finish my question, please?

(Testimony of Kenneth H. Klee.)

Mr. Davis: It is leading and suggestive, You said, "In other words."

The Court: It was more a statement of counsel than an inquiry of the witness. Objection sustained.

Q. (By Mr. Miller): Now, with reference to North American, what was the situation on the same subject matter that you just related with reference to General Accident?

A. The situation was that when Love got the Campagnola line and had to place it, being small agencies, fire facilities were quite limited.

He had General Accident. He had another carrier and he came to me and said, "Where can I place the balance?"

And I suggested to him at that time that he contact Bill Parker over at North American and see if he could take it.

Q. Now, during the period of August, 1954, did you learn from Mr. Love that he had placed increased insurance coverage for General Accident and North American through your agency?

Mr. Davis: I object to that as hearsay, incompetent, irrelevant, and whether he learned or not, it would be immaterial. [114]

He should also fix the time, and again it calls for a conclusion, whether he had placed it. That is the gist of the whole case.

Mr. Miller: I will withdraw my question. I think the objection is well taken in certain regards.

Q. (By Mr. Miller): Did you have any conversations with Mr. Love in August, 1954, in which

(Testimony of Kenneth H. Klee.)

he informed you of the fact that he had placed insurance in your name through General Accident and North American, in connection with the Campagnola line?

Mr. Davis: I object to that, unless he fixes the time, as to whether or not it was before or after the event here, transaction, and fire.

Mr. Miller: I should say ratification.

Mr. Davis: Otherwise it calls for a conclusion.

Mr. Miller: I respectfully submit, your Honor, there can be ratification as well as authorization.

The Court: Of course, there may be. What Mr. Davis is getting at is the time isn't fixed. You should fix the time.

Mr. Miller: I did fix it in August, 1954, the time of the fire, your Honor.

Mr. Davis: It is very, very material whether he fixes it before or after. The fire was on August 7th. This alleged binding by the oral contract was three or four days before. [115]

Did he learn of anything about this from Love before or after? If after, it would be solely relating to a past event and would not be binding upon either him or either one of the insurance companies.

Mr. Miller: I respectfully submit, your Honor, an authorization can be either a present authorization, in advance, or a subsequent ratification.

Mr. Davis: Not in an insurance contract, when the fire has already occurred.

Mr. Miller: I must respectfully submit Mr.

(Testimony of Kenneth H. Klee.)

Davis is making up new rules of law. That is not the law.

Mr. Davis: Right now, if you wish, I will cite you plenty of cases.

Mr. Miller: But they won't hold that point.

The Court: The objection is overruled.

Q. (By Mr. Miller): Do you understand the question or would you like to have it read?

The Witness: Please, may I have the question again?

(The question was read.)

The Witness: Yes, I did.

Q. (By Mr. Miller): Will you please relate the conversation?

Mr. Davis: Again I object until the date is fixed, whether before or after the event. I just want to call your Honor's attention to a case in this Circuit Court of Appeals [116] of this State—of this Circuit. Engleman v. Insurance Company. I think it is 87 Fed. (2d). The very point was raised, and the court definitely decided there could be no insurance after the fire, and, therefore, there could be no ratification.

The Court: Can you give us the date?

The Witness: Mr. Love told me about it after the loss had occurred.

Q. (By Mr. Miller): Now, when——

Mr. Davis: I object to that as hearsay, wholly, then, too, in addition to my previous objection.

Mr. Miller: We submit these are agents, your

(Testimony of Kenneth H. Klee.)

Honor, acting under a general agency. Mr. Klee was acting under a general agency for this company. We can't prove our case any other way.

The Court: Members of the jury, understand that just in the very nature of insurance it is an undertaking to indemnify a person for a loss which might occur. It is not possible to insure for a loss which has already occurred.

So in looking at the arrangement between the parties, if there was one, you will have to determine whether the party who claimed to have been insured here had arrived at a contract with the insurance company before the fire.

Now, this evidence which is presently offered is admitted on the whole case, so that it will be before you [117] to assist you in making that determination.

You will, if you find for the plaintiff, do so only as to such policy or policies as were agreed upon by the company or its authorized agents prior to the occurrence of the loss.

Mr. Davis: The court please, that is a vital point to me and I would like to be sure that my objections, for the sake of the record, are properly taken.

I would like to restate them. It is never competent for an agent or alleged agent to bind or attempt to bind his principal by a statement made subsequent to the event.

And, more particularly, in cases of insurance, when the binding or attempted binding or the ratification alleged is after the event, because, as your

(Testimony of Kenneth H. Klee.)

Honor has just said, the insurance is against a contingent or unknown event, and when that event occurs there can be no insurance.

I am stating that for my record, and my objection is on that ground and for that reason. It is wholly hearsay; it so becomes wholly hearsay. Then it is Love's recitation that happened in the past, which can't be done in any agency case.

The Court: I think the entire course of conduct between these parties may be inquired into with reasonable limits, to determine whether there was a contract in advance of the fire. [118]

The jury will understand that that is the only time that the making of a contract here would be important. You just can't insure after the fire. I don't think that you are contending that you can.

Mr. Miller: No, not at all. We don't contend there was any insurance after the fire. We contend the agreement of insurance was before the fire.

The Court: But the conversations of the parties might throw some light upon what they understood they had or had not done, and for that reason their conduct at the time in question is properly a matter to be before the jury.

I understand you object to it, Mr. Davis, but the objection is overruled.

Mr. Davis: May I add to that it is just hearsay, under those conditions, wholly hearsay.

Mr. Miller: Has your Honor ruled?

The Court: I overruled the objection.

Mr. Miller: Thank you.

(Testimony of Kenneth H. Klee.)

The Court: I did it some time ago, but it still holds.

Mr. Miller: I must confess that I have lost track of the question.

(The record was read.)

Q. (By Mr. Miller): Will you please relate what the conversation was that you then had with Mr. Love on the subject that I put to you? [119]

Mr. Davis: I renew my objection on that question on the same grounds as previously stated.

The Court: Overruled.

The Witness: I noticed the——

Q. (By Mr. Miller): Just tell us the conversation, please, what you said and what Mr. Love said.

A. The conversation took place on Sunday when I noticed the loss in the paper, and I called Mr. Love at his home to see if he had read it.

His remarks were that he didn't know about it and he had ordered some additional insurance on the line the previous week.

Q. And what did you say?

A. To the best of my knowledge, that is all that occurred at that time.

Q. I see. Now,——

Mr. Davis: Just a minute. I move to strike that portion that he had ordered insurance the previous week upon the ground that it gives a conclusion.

The sole question before the jury is that very question, whether or not there was a contract of

(Testimony of Kenneth H. Klee.)

insurance in existence at the time of the fire. If we are going to let this witness, by hearsay, tell us there was, there will be nothing for the jury to act upon.

The Court: Motion denied. I don't think the effect of [120] the evidence is as great as you state, Mr. Davis.

The Clerk: Plaintiff's 3 for identification.

(The document referred to was marked Plaintiff's Exhibit 3 for identification.)

Mr. Davis: May I see it just once more?

Mr. Miller: Certainly.

Mr. Davis: You say I furnished that?

Mr. Miller: You have another copy. I will take the original.

Mr. Davis: That is all right. I wasn't sure.

Mr. Miller: All right.

Q. (By Mr. Miller): Mr. Klee, on or about July 27, 1950, did you enter into a written "Profit-Sharing Agreement" with the General Accident Company shortly after you entered into this agency agreement, which is Plaintiff's Exhibit No. 1?

A. Yes, I did.

Q. Is this the document (indicating)?

A. Yes.

Q. Was it in effect in 1954?

A. Yes, it was.

Mr. Miller: We desire to introduce, your Honor, in evidence this Profit-Sharing Agreement between Mr. Klee and General Accident.

Mr. Davis: Objected to as immaterial. It doesn't

(Testimony of Kenneth H. Klee.)

prove [121] any of the issues of the case. It has nothing to do with the agency authority.

There are other documents, a part of that agreement, also showing the submission schedule, and so on.

Mr. Miller: If you have any other documents in connection with that that haven't been introduced, I will consent to their going in without seeing them.

Mr. Davis: You go ahead and put in your evidence, subject to my objections.

The Court: The present offer is accepted. The document is received into evidence.

What is the number of it, Mr. Clark?

The Clerk: Plaintiff's 3.

(The document heretofore marked Plaintiff's Exhibit 3 was received in evidence.)

PLAINTIFF'S EXHIBIT No. 3

(Admitted in evidence 6/19/56.)

Profit-Sharing Agreement

Between General Accident Fire and Life Assurance Corporation, Ltd., and Kenneth Haskell Klee to Apply on Fire & Inland Marine Business, Effective July 27, 1950.

In addition to the regular schedules of commissions agreed upon the Company agrees to allow a participation of ten per cent (10%) of the profits

(Testimony of Kenneth H. Klee.)

Plaintiff's Exhibit No. 3—(Continued)

produced by the Agency, for each year, in accordance with the following formula:

Credits

(1) Net Premiums Written. (Gross premiums less return premiums, and less reinsurance effected by or at the request of the Agent.)

(2) Premium Reserve, from previous year.

Debits

(1a) All Charges for Commissions, etc., on net premiums written as defined in paragraph 1 of Credits.

(2a) Losses Incurred developed as follows:

1. Losses Paid.
2. Add Losses Outstanding at end of current contingent year.
3. Deduct Losses Outstanding at end of preceding contingent year.

(3a) Home Office expense—10% of the net premiums as defined in item 1 of Credits.

(4a) Taxes, etc.—5% of the net premiums as defined in item 1 of Credits, to cover all taxes, license fees, advertising required by law, patrol and salvage corps assessments, underwriters board expenses, stamping office expense, and map corrections.

(Testimony of Kenneth H. Klee.)

Plaintiff's Exhibit No. 3—(Continued)

(5a) Premium reserve—50% of the net premiums of the current year as defined in item 1 of Credits.

(6a) Deficit, if any, from previous year's profit sharing account.

Note 1. Deficit of any individual year to be carried forward one year only.

Note 2. Wherever used in this Agreement Losses Paid or Losses Outstanding represent Gross Losses and Loss Adjustment Expenses (including legal and other loss expenses) less Salvage Received and Recoveries on Reinsurance effected by or requested by the Agent.

It is understood and agreed that no Profit Statement shall be made and no participating profit paid in any year unless the net premiums on Fire and Inland Marine writings exceed $2,500.00. If the period covering the first Profit Statement is less than one year then the minimum volume for Fire and Inland Marine business shall be pro rata of the annual requirement.

Premiums written through the Factory Insurance Association or other Service Associations or Organizations shall not be included in this Profit Sharing Agreement.

The first Profit Sharing period expires on the last day of September, and annually thereafter, excep-

(Testimony of Kenneth H. Klee.)

Plaintiff's Exhibit No. 3—(Continued)

ting with respect to Agents appointed subsequently to March 1st of any year, in which case the first Profit Sharing Statement will be calculated as of the end of September of the following year.

This profit sharing agreement is made in conjunction with the regular agency agreement and in the event of the termination of such agency agreement it is understood and agreed that this profit sharing agreement is also terminated automatically. In the event of the termination of this agreement by either party before the end of any profit sharing year, the agent's portion of profits shall be computed at the end of said profit sharing year, and the agent shall have no further interest thereafter in the results of the business.

This profit sharing agreement takes the place of and abrogates any prior profit sharing agreement, whether verbal or written, between the parties mentioned herein.

The Company shall, within a reasonable time after the expiration of the profit sharing year, prepare and submit to the agent the Profit or Loss Statement and on request will remit the amount found to be due, provided all premiums and all other indebtedness for the period covered by the Statement have been paid. No charge for the amount due shall be made in the Agent's account without specific authorization from the Company.

(Testimony of Kenneth H. Klee.)

Plaintiff's Exhibit No. 3—(Continued)

In witness whereof, this agreement has been signed in duplicate by the parties hereto, this 27th day of July, 1950.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION.

By /s/ [Indistinguishable]

By /s/ KENNETH HASKELL KLEE, Agent.

Witness:

/s/ GLADYS GORDON.

Witness:

/s/ D. H. McCRONE.

Q. (By Mr. Miller): Mr. Klee, could you summarize for the jury the terms and provisions of this profit-sharing agreement in general form, so it won't have to be read, and they will have some idea as to what it is?

Mr. Davis: I think I will object to the instrument, it speaks for itself. Counsel can summarize it when he makes his argument.

Mr. Miller: I thought we would get it as we go along.

The Court: Objection sustained. You may read it. It is in evidence. But any inferences will have to be drawn by [122] the jury and we can't be having witnesses interpreting written instruments.

(Testimony of Kenneth H. Klee.)

Mr. Miller: All right, your Honor. We will refer to it later. That will be all. Cross-examine.

Cross-Examination

By Mr. Davis:

Q. Mr. Klee, you knew nothing about this alleged additional or oral insurance contract until after the fire? A. That is correct.

Q. Your relationship with Mr. Love was that you and he shared offices and shared office expenses? A. That is correct.

Q. But you each operated independently?

A. That is correct.

Q. And you never appointed him as a subagent under you formally, did you?

Mr. Miller: Just a moment. We submit that that calls for a conclusion of the witness. The witness can recite—and I make the same point counsel made previously, namely, that with reference to this subject matter, rather than the witness giving his conclusion, he should recite the facts.

Mr. Davis: Very well. I made that same objection, and I think mine was overruled, although it was in the same form.

I will withdraw it and ask him the question this way:

Q. (By Mr. Davis): Did you ever enter into any written [123] contract with Dick Love with reference to sharing the privileges or responsibilities of your agency agreements with either the Insurance Company of North America or General Accident Insurance Company ?

(Testimony of Kenneth H. Klee.)

A. We had no written agreements between us on these matters.

Q. Your operations between you and Mr. Love, whereby he would place business in one of your companies and you sometimes placed business in one of his companies, was the ordinary exchange of business through agents, was it not?

Mr. Miller: We object to that as calling for a conclusion of the witness, your Honor.

The Court: I will have to have it read.

(The question was read.)

Mr. Miller: That is for the jury to decide.

Mr. Davis: I don't think that calls for a conclusion. That is a well-known practice, and I will go further. And, besides, I am cross-examining.

The Court: The objection is overruled.

You may cross-examine, but, Mr. Davis, I would appreciate it if you would do it from the lectern.

Mr. Davis: Pardon me, your Honor.

The Court: This room has its acoustical problems. We have the lectern at a point from which an attorney is best heard. [124]

Mr. Davis: I got indulged to sit the last time I tried a case, as I had been ill.

The Court: You have returned to vigorous health, Mr. Davis. We will expect you to stand.

Mr. Davis: I had all my teeth out, that is why.

The Witness: May I ask what you mean, sir, by "usual agency," which was at the tail end of the question? I don't remember the entire question.

(Testimony of Kenneth H. Klee.)

Q. (By Mr. Davis): You are familiar with the rules and practices of the Insurance Department and the Insurance Code, or you wouldn't be an agent; am I correct? A. That is correct.

Mr. Miller: We object to that as calling for a conclusion of the witness and not proper cross-examination.

Mr. Davis: I think there are many, many rules or you wouldn't have submitted these lengthy series of instructions, nor would I have done so, nor would we call upon the court to rule upon these——

Mr. Miller: We submit the witness is not called upon to testify as to those rules of the Department of Insurance, and so forth.

Mr. Davis: I haven't asked him to testify. I am just asking him—I am testing his qualifications. Now I will find out. If he is not familiar with the rules, then I will ask him how he ever got past an examination. [125]

The Court: We are not going to try whether or not he is a good agent.

Mr. Davis: No.

The Court: Or whether or not he is qualified by the State. I think the question is proper, as going only to the subject of the understanding of the witness of terms which have been used in the testimony, because we sometimes have the problem that one person will use a word in one sense and another in a different sense, and we always permit the witnesses who use words, particularly words of art, to

(Testimony of Kenneth H. Klee.)

tell us what they mean by that word, in order that there can be a common ground of terminology.

Q. (By Mr. Davis): I say, you are familiar with the rules and practices, the code and rulings of the Insurance Commissioner's Office, in reference to insurance, are you not?

A. I am not familiar with all of the rulings of the Insurance Office, no.

Q. Not all of them?

A. I studied and passed the exam for insurance agent, and also for insurance broker. I don't know offhand how much of that knowledge has been retained, to answer a specific legal question involving the law of agency.

Q. Let me say, I am only asking this to clarify in your mind the question that is going to follow. I am not [126] going to cross-examine you on insurance law or rules of the Commission entirely. I am just going to ask you a few questions.

It is permitted, is it not, under the Insurance Code and by the rules of the Commission for an agent, licensed agent, to place business with another licensed agent——

Mr. Miller: I object——

The Court: Let him finish the question.

Mr. Davis: Please let me finish. I don't mind your interrupting me if you do it impulsively, but if you do it deliberately I don't like it.

Could I have my continuity of the question?

(The record was read.)

(Testimony of Kenneth H. Klee.)

Q. (By Mr. Davis): ——and for the other licensed agent to pay the commission which would become due to him for—the agent to pay the commission which would be due to him, to the other agent, where the other agent doesn't have the facilities for placing it?

Mr. Miller: I object——

Mr. Davis: Let me finish.

Mr. Miller: I thought you had finished.

Q. (By Mr. Davis): You are familiar with that rule and situation, are you not?

Mr. Miller: We object to the question, your Honor, upon the ground that it calls for a conclusion of this witness. [127] It asks the witness to pass upon legal questions, and I think if the jury is to get any instructions on the law it should come from the court and not from Mr. Davis or the witness here, insofar as the Insurance Department is concerned.

The Court: Objection sustained.

Mr. Davis: The court please, I am going to ask a similar question. Let me explain why I am asking it.

I want to elucidate these transactions that he has indicated took place between him and Love. And the reason is that it is permitted and the agents may, from another licensed agent, accept business, but that doesn't make the other licensed agent in any way, shape or form an agent or subagent of the agent's principal.

Now, I want to show that is just exactly——

(Testimony of Kenneth H. Klee.)

The Court: If that is so, it isn't the province of the witness, as a witness, or you, as counsel, to be telling the jury that. If that is the law, the thing to do in treating it is to submit that particular statute or rule to me in the form of an instruction and ask me to read it to the jury.

Mr. Davis: I expect to do that, your Honor. I am trying to clarify what took place between Love and Klee.

Now, it has been implied, and counsel used the word "subagent" and things like that, which is entirely a different matter.

The Court: You may go into that and you can point out [128] —in fact, I thought you were trying to do that by an earlier question, but it turned out otherwise—what he meant by the term "agent" or "subagent." You can inquire into that fully.

Mr. Davis: I think your Honor has offered me a good suggestion. I will ask him that very question.

Q. (By Mr. Davis): What do you mean by "other agent"? How do you distinguish "other agent" and "subagent"?

A. These things are outlined by the Department of Insurance. Specifically, an agent is an appointed representative of an insurance company. A subagent, in the technical term used in the insurance business, is also appointed by the insurance company, but responsible to the agent under whom he is appointed as subagent.

Q. Let me——

(Testimony of Kenneth H. Klee.)

Mr. Miller: Just a moment. I move to strike the answer as not responsive. The witness in his answer has testified as to the law on a situation. The question called for what his understanding was of the term.

Mr. Davis: This is cross-examination, your Honor.

The Court: Is that what you understand the term to mean?

The Witness: Yes.

Mr. Miller: All right.

The Court: Denied.

Q. (By Mr. Davis): In other words, a subagent is an [129] agent appointed by the principal, the insurance company, but operating under the agent, the principal agent, that is correct, isn't it?

A. That is correct, yes.

Q. When we speak of "other agent" or when you are speaking of "other agent" you mean either somebody appointed as an agent by the same company which you represent or by some other company? He is another agent, is that what we are talking about?

A. Another agent is an individual licensed as an agent by the California Department of Insurance.

Q. And appointed by some insurance company?

Mr. Miller: We object to that as assuming a fact not in evidence and being contrary to the law, A subagent can be appointed by an agent, and counsel knows that to be the law.

(Testimony of Kenneth H. Klee.)

Mr. Davis: Just a minute. The witness testified what he meant by "subagent" was just what he said. What counsel states is not what the witness has stated.

Mr. Miller: You are stating what the law apparently is, and I don't think it is a correct statement.

Mr. Davis: I asked him if that——

The Court: This trial is bogging down into a great deal of legalistic bickering. I wish you would both stop it and get down to what occurred. What did the pertinent parties [130] say to each other, if this were an oral thing. What did they write, if it was a written thing.

Let's not try to make lawyers out of witnesses. It is perfectly proper to find out what they mean by a particular term, but not to get them to certify that it is also the language of the Legislature or some commission.

Now, we will take the afternoon recess, and I hope that you will get your bearings set so we can go straight forward thereafter.

(Whereupon, a recess was taken from 3:00 o'clock p.m. to 3:30 o'clock p.m.)

The Court: I am going to excuse the jury for the day. We will take the afternoon on legal matters.

You are excused until tomorrow morning at 9:30 —or is that too early for you?

Let's start at 9:30. That will allow us to take a

good break midmorning and still get in two hours of productive time during the morning.

But I think that we can smooth out a number of these legal questions if the counsel and court work on it for the rest of the afternoon and excuse you. So you may now withdraw. Thank you.

(Whereupon, the following proceedings were had out of the presence and hearing of the jury:)

The Court: The jury has now withdrawn. Counsel came [131] to chambers during recess and acquainted me with a problem which I think should be on the record, so let's have it on the record now.

Mr. Miller: Later in the examination of Mr. Love, one of the witnesses, there will be offered, or, I desire to introduce two memos. He sent one to the Insurance Company of North America and the other to General Accident.

We would like to have the documents in the form they were in when they were sent to those companies and when they were received by those companies.

At the taking of the depositions of representatives of the company, examination of the originals that were signed indicates notations that were made by insurance company employees and by others who have not even been identified in the taking of the depositions.

I think it is, therefore, important in the presentation of the evidence that we be permitted to

introduce documents in that form. And I say to the court that I have in my possession what purports to be carbon copies made at the same time as the originals, that they were made. That subsequent to their making there were notations put on the carbon copies by Mr. Love, that were not on the documents when they were sent.

It is my suggestion that either the originals be produced and that the notations thereon, that were put on by others— [132] some of those identifiable and some of them not, which appears from the depositions—be blocked out until the balance of them are identified or allowed to be introduced in evidence.

When I use the term "blocked out" I mean covered by some paper, so that if they are permitted to be introduced in evidence, then the paper can be removed.

Or I have had prepared reproductions of the carbon copies that Mr. Love made, excluding, however, the notations that he made later on, and that were not on the originals or the carbon copies when he sent them to the General Accident and the Insurance Company of North America.

I feel that the court, in the control of the litigation, has the power, and I think that we shouldn't be hampered in the progress of the handling of our case, and we should be permitted to have some restrictions made on the document which is introduced, until after all of it is proved to be competent.

Certainly, part of it is competent, insofar as it represents the document in the condition that it

was when it was sent.

Mr. Davis: I will object to such procedure, such departure from the normal procedure.

The gist of the matter would be, did these companies receive a certain document from Mr. Love? As counsel has [133] stated, and it is a fact that the original documents as received by the companies are in our possession and have been produced in depositions, and I have them here.

Counsel has subpoenaed, asked me to produce them. The documents do bear notations which the deposition shows were made contemporaneously with the receipt of the documents.

Now, what counsel proposes is not to produce the best evidence, but produce a copy of the material document, and a copy that he himself says he has had to change in order to show it as it was as a copy.

I think the notations were made—as I said a minute ago, the real competent testimony is the receipt of the document by the defendant. These notations were made contemporaneously with the receipt of the document.

It is not unusual, and the court never tries a case he doesn't have documents with certain notations on them that must be explained away. A witness can testify "Yes, that is the document I sent."

"Are those notations, were they on there when you sent them? A. No."

Very well. You receive only such part of the document as was sent under this witness and leave

further explanation of the document to any following witnesses.

I would object to counsel, when the best evidence is [134] available for the purpose of assisting his case, using a document which is not even the best evidence of the copy, but one that is made from the copy.

The Court: The court directs that if these documents are offered in evidence that the plaintiff is entitled to have them first come to the jury's attention in the condition in which they were transmitted to the defendants by the agent, and that to that end all extraneous matter, regardless of who placed it on there, be covered so that the document may be, when it is read to the jury or passed to the jury—assuming that you are going to follow the usual custom of reading it or passing to the jury upon its receipt in evidence—will be the document as it was first seen by whoever opened the mail in the office of the receiver of the document.

Then if the notations upon it become important, upon proper foundation, for receiving them, we will unveil, as it were, the additions which have accrued to the document.

I think probably the documents are, insofar as I have seen them. which hasn't been to any great extent, that they are relevant and material here as documents which were sent and received, if the evidence shows they were received, and that the notations placed upon them by either the agent or the persons employed in the home office of the company are not admissible. [135]

But whether they are or are not admissible—referring now to the notations—will depend upon the further evidence in the case.

In any event, as originally received, we will have the pure document, meaning the document which was transmitted and received.

Mr. Miller: May I ask counsel then to produce the originals so they can be conformed in accordance with your Honor's direction?

Mr. Davis: Yes. I won't produce them at the time you call for them during the trial, but I will leave them with the clerk.

Mr. Miller: All right. May I ask the direction be made to the clerk then to cover them in accordance with your Honor's direction?

Mr. Davis: Are we going to cover those in such a way we can get the covering off very easily without destroying the document? I don't know how you will do it. I don't know why counsel can't introduce just what was received and then read it to the jury. He has read everything—then if the balance becomes——

Mr. Miller: In the interest of time, why not use a substitute copy I have, and then when this becomes material, you use it.

Mr. Davis: Because I think we should have the best [136] evidence in when we have it here before us.

Mr. Miller: The court has already ruled, and I will abide by the court's decision.

Mr. Davis: I was just suggesting, of course, that you read it to the jury.

Mr. Miller: I prefer having the document itself.

Mr. Davis: We will let Mr. White worry about it then. I am just suggesting, though.

The Court: Mr. White is the clerk. Can you cover up the notations on those exhibits and give them exhibit numbers for identification? Identify them for the stenographic record and then cover up the notations on them.

The Clerk: Plaintiff's 4 is the memo to General Accident. And the memo to Insurance Company of North America will be Plaintiff's 5.

(The documents referred to were marked Plaintiff's Exhibits 4 and 5 for identification.)

Mr. Miller: May I suggest to the court, or call to the court's attention that I just observed from Mr. Davis' own pretrial memorandum, that he has quoted the document exactly as the directions of the court would make the document appear. The words in his memorandum, he sets forth as it was originally received by the companies.

The Court: Of course, the time of the contract——

Mr. Miller: It is set forth in haec verba, the exact [137] language, without any notations on it.

Mr. Davis: If you will read that carefully to the court, I said there he received this document and he immediately made these notations on there.

Mr. Miller: I beg your pardon.

Mr. Davis: The court has ruled.

The Court: This is being conducted too much like a proceeding in a court which does not have a

stenographic recording of its evidence. We will have one person who starts to talk and another breaks in on it.

I wish we could get away from that, because it will make a very difficult record for anyone to read and fully comprehend.

Mr. Davis: I will try, your Honor, myself. I probably have been the worst at that.

The Court: I will say that the offense in that regard has been equal fault, to use an admiralty term.

Mr. Davis: The court please, I have these additional instructions. I got them numbered.

The Court: Thank you.

Mr. Davis: And a copy for counsel.

Mr. Miller: Your Honor, I have just been informed by my next witness that apparently he is required to attend a tumor examination of some sort——

Mr. Love: My wife. The tumor board at St. Francis [138] Hospital.

Mr. Miller: What time do you expect you will be back?

Mr. Love: The tumor board meets about 8:30 or 9:00 in the morning. I live at Downey.

Mr. Miller: He is called upon tomorrow morning at an early hour to attend a tumor examination.

Mr. Love: St. Francis Hospital, for my wife.

Mr. Miller: What time do you expect to be back here?

Mr. Love: I live in Downey. I will have to take

her from Lynwood to Downey and then proceed down.

I imagine I can get there around 10:30, possibly a little earlier or possibly a little later.

The Court: You have further examination of the witness who is on the stand?

Mr. Miller: Yes. There will be further examination of that witness on the stand, but I thought I should apprise the court of the situation I have just learned of here.

The Court: If necessary, we can take the recess.

Mr. Davis: Do you have any other witnesses?

Mr. Miller: There will be no other witnesses.

Mr. Davis: Then I will be prepared.

The Court: Do you have anything else we should do for our record here?

Mr. Miller: Does your Honor desire to explore the matter of instructions at the present [139] time?

The Court: It is too early. I haven't had an opportunity to read them all.

Mr. Miller: May I suggest the prescription that we discussed previously between counsel and the court?

The Court: Yes. We stand in recess until tomorrow morning at 9:30.

(Whereupon, at 3:45 o'clock p.m., Tuesday, June 19, 1956, an adjournment was taken to Wednesday, June 20, 1956, at 9:30 o'clock [140] a.m.)

Appearances:

For the Plaintiff:
HARRY J. MILLER,
333 South Beverly Drive, Suite 205,
Beverly Hills, California.

For the Defendants:
E. EUGENE DAVIS and
E. EUGENE DAVIS, JR.,
636 South Serrano Avenue,
Los Angeles, California.

Wednesday, June 20, 1956—9:37 A.M.

The Court: The jury and parties are present. You may proceed.

KENNETH H. KLEE

called as a witness on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Mr. Davis: We have no further questions from Mr. Klee.

Redirect Examination

By Mr. Miller:

Q. Mr. Klee, prior to 1954, did you have discussions with Mr. Love as to his use of your name in connection with dealings with North American?

Mr. Davis: Just a moment, your Honor. We will object to that as incompetent, irrelevant and immaterial, and not binding upon the defendants; hearsay.

(Testimony of Kenneth H. Klee.)

The Court: Well, it calls for an answer as to whether or not he had dealings. The objection to the immediately pending question is overruled.

The Witness: The situation——

The Court: No. You just answer you did or you did not have dealings.

The Witness: Yes.

Q. (By Mr. Miller): And when were those discussions or [143] dealings with Mr. Love with reference——

The Court: Mr. Love hasn't come into it. You said North American, didn't you?

Mr. Miller: Yes. But I thought my question was directed to his having discussions with Mr. Love as to dealings with North American.

The Court: You got to that conclusion without having asked that.

Mr. Miller: I beg your pardon?

The Court: You reached that conclusion in your mind, without having developed it from the witness. You had better establish with whom before you reach the conclusion.

Q. (By Mr. Miller): Did you have discussions with Mr. Love in 1953, '53, or '54, prior to August 3, '54, as to his dealing with North American under or in your name? A. Yes, I did.

Q. Will you tell us, please, what those discussions were on that subject?

Mr. Davis: I make my objection. Incompetent, irrelevant and immaterial, hearsay, and not binding upon the Insurance Company of North America.

(Testimony of Kenneth H. Klee.)

The Court: The objection I think should be sustained, Mr. Miller. This case, if you have a case, depends upon whether there is a contract between the company that you claim purchased the insurance, and the insurance company. So far we [144] have had no evidence of what went on between those parties. We are having evidence of what went on between the agents or the persons you claim were agents. It is up to the jury to determine whether they were.

But by going at it that way you are beginning at about the second link of the chain.

Mr. Miller: But, your Honor, if I put Mr. Love on the stand for the first time I would be confronted with the fact I haven't established the agency of Mr. Klee, so I put Mr. Klee on to establish that, and Mr. Love goes on next.

The Court: You may establish the agency.

Mr. Davis: May I add to my objection so as to make it clear, there is no evidence whatsoever of Mr. Klee's authority to bind the North American by such discussions as were had.

The Court: That would call for an analysis of of all the exhibits.

Mr. Miller: May I also direct the court's attention to the fact that on cross-examination counsel himself, with reference to an exhibit that is going in, asked him whether he had authorized Mr. Love to use his name on that memorandum.

The Court: Yes. If that is the purpose of this

(Testimony of Kenneth H. Klee.)

line of inquiry, I will reverse myself, and the objection is overruled.

Mr. Davis: May I call your attention to one thing. [145] Mr. Klee has already testified that he knew absolutely nothing about this transaction——

The Court: Let's not argue the case. The case as a whole is not up for decision at this moment.

Q. (By Mr. Miller): Do you understand the pending question, Mr. Klee?

A. Did I discuss this with Mr. Love prior to 1954, August of '54?

Q. That is, the use of your name in connection with North American business.

A. Mr. Love had a problem——

The Court: Well, did you discuss it?

The Witness: Yes.

The Court: That doesn't call for your telling what the discussion was.

The Witness: All right.

The Court: We have to take the steps one at a time.

The Witness: I answered yes, and he asked when.

The Court: That calls for telling when, not what.

The Witness: Starting in 1952, I believe, when he first had a problem placing the line, I suggested he call——

The Court: You have answered it. You told us when.

The Witness: All right.

(Testimony of Kenneth H. Klee.)

The Court: You can't just give narratives in court. You have to answer questions, because, as you probably notice, [146] lawyers do a great deal of objecting.

The Witness: I see.

The Court: They start objecting when you go beyond the answering of the exact question.

The Witness: I see.

The Court: Because you might be getting into a line of testimony which they feel is objectionable on some other ground.

The Witness: I see.

Q. (By Mr. Miller): Now, will you please relate what the conversation was at that time on that subject?

Mr. Davis: Pardon me. I thought the court asked him to fix the time.

Mr. Miller: He did.

The Court: He has fixed it.

Mr. Davis: I didn't hear it.

The Court: Read the answer.

(The answer was read.)

Q. (By Mr. Miller): Now, would you please relate what was said on that subject?

A. I suggested he call the Insurance Company of North America.

Mr. Davis: This is subject to my objection of hearsay and not binding on the defendant.

The Court: Overruled. [147]

(Testimony of Kenneth H. Klee.)

The Witness: And he did call, and he did place the business through my name——

The Court: Now, that is a conclusion. You are asked for conversation, not how he placed the business.

Mr. Davis: May I move to strike that last statement?

The Court: Granted.

Q. (By Mr. Miller): Will you please relate what was said on that occasion by you and Mr. Love on the subject of his using your facilities with North American, in your name, in dealings with North American?

A. I believe I answered that. I told him to call them.

Does that answer the question? I am a little confused how far I should go in answering that.

The Court: You may relate everything that was said. If your memory goes to the extent of remembering the exact conversation, you can go that far. If you remember the substance, give the substance.

The Witness: The substance is I suggested he call Bill Parker of the Insurance Company of North America.

Q. (By Mr. Miller): And do what?

A. In normal procedure, discuss it with him and see if they would write it.

Q. Subsequently, did you find there was business transacted by Mr. Love with North American that was charged [148] to your account? A. Yes.

(Testimony of Kenneth H. Klee.)

Q. Did you object at any time to that type of business? A. No.

Mr. Davis: I am going to object to that as incompetent, irrelevant and immaterial and not binding upon the defendant. Mr. Love was a broker who placed his business through Mr. Klee. It has been so testified.

The Court: Objection overruled.

Q. (By Mr. Miller): Now, from that point on, did you observe in your statements from General Accident that there was business placed during the period of sometime in 1952, 1953 and 1954, prior to August 3, 1954, by Mr. Love that was charged to your account? A. Yes, I did.

Q. And did you make any objection to that at any time?

Mr. Davis: Same objection made as to the North American testimony.

The Court: Overruled.

The Witness: I did not object.

Mr. Miller.: May counsel approach the bench for one moment?

The Court: If it is necessary.

(Whereupon, the following proceedings were had in the presence but out of the hearing of the jury:) [149]

Mr. Miller: There is a subject matter in connection with those two memos that went in, I believe, as Plaintiff's Exhibits 4 and 5 yesterday,

(Testimony of Kenneth H. Klee.)

which have not been introduced in evidence, that I would like to interrogate this witness on.

However, I think it would be better if I be permitted later to recall him, after the evidence is in.

I don't want to lose the right of examining this witness on the subject of those memoranda later on. I feel Mr. Love's testimony, the foundation is necessary before I go into the subject.

I would like to have permission, if I excuse the witness now, to be permitted to recall him after I have concluded with Mr. Love.

If I haven't made myself clear on that subject matter, I will be glad to clarify it, your Honor.

The Court: Well, I haven't had opportunity to fully digest the exhibits to which you refer. If you don't feel that it is appropriate to go into it with this witness now, you can call your next witness and go into it after you have examined him.

I think we are going to have to have evidence here, if you are to prevail, showing the terms of the contract privity. In other words, that would include also the terms of the premium, the duration of insurance, all of those things which [150] would show an understanding between the person who purchased the insurance and the firm that issued it, through its agent.

Your problem here isn't only the problem of agency, it is the problem of what was the contract. Although the statute of frauds does not prohibit an oral contract of insurance, the contract is so

(Testimony of Kenneth H. Klee.)

unusual that you have got to have clear evidence of it.

Mr. Miller: Well, I wasn't calling this witness to establish by him——

The Court: I understand that. It just seems to me your case is rather backwards. The first witness, in the ordinary course, would be the person who ordered the insurance and who had the assurance that the policy was coming to him.

Mr. Miller: I can say this: I was confronted with the problem of anticipating an objection if I didn't put Mr. Klee on first. I wasn't laying a foundation for Love's testimony.

And I probably could have started with Mr. Love, but I don't think it has done any harm. I do feel there is a line of testimony I should elicit from this witness, but it is premature now. I would like to have permission to recall him later.

The Court: That is granted. [151]

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

Mr. Miller: I have nothing further with the witness at the present time.

Mr. Davis: I didn't object to these questions being redirect. They were direct. I would like the privilege of cross-examining on them now.

The Court: Surely.

(Testimony of Kenneth H. Klee.)

Recross-Examination

By Mr. Davis:

Q. Mr. Klee, during all the time that you and Mr. Love shared offices together, you each had a broker's license, did you not? A. Yes.

Q. And you placed business as a broker with Mr. Love, with companies he represented, and he placed business with you on that basis, isn't that correct? A. That is correct.

Mr. Davis: That is all.

Mr. Miller: That is all.

(Witness excused.)

Mr. Miller: I will call Mr. Charles Richard Love. [152]

CHARLES RICHARD LOVE

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please be seated?

Your name, sir?

The Witness: Charles Richard Love.

Direct Examination

By Mr. Miller:

Q. What is your business, Mr. Love?

A. I am an insurance agent.

Q. And how long have you been in the insurance business? A. Approximately eight years.

(Testimony of Charles Richard Love.)

Q. During the year 1954 where was your office?

A. 510 West 6th Street.

Q. And was that the same office as was occupied by Mr. Klee? A. That is correct.

Q. How long had you occupied that office with Mr. Klee?

A. Since my entry into the insurance business as an agent for myself, in my own capacity, which was just about July of 1950.

Q. In connection with that arrangement, did you both use the same telephone number? [153]

A. Yes.

Q. What other facilities did you use jointly during that time?

A. We split overhead completely, down the middle. We shared secretarial expense, telephone expenses, stamps, supplies, rent; everything, all overhead.

Q. Did you during that period of time use each other's companies for which the other was a general agent? A. Yes; on several occasions.

Mr. Davis: I object to that as incompetent, irrelevant and immaterial, and not binding upon either of these two defendants. What these people did as between themselves would not establish or even tend to establish an agency for these companies.

Wholly extracurricular, as we say, and would be entirely without the act or acquiescence or consent of the company.

Mr. Miller: This question is preliminary. I intend to go into the matter of General Accident and

(Testimony of Charles Richard Love.)

North American specifically, but I am trying to show the relationship between Mr. Love and Mr. Klee.

The Court: Sustained.

Q. (By Mr. Miller): Directing your attention to the General Accident, were you at any time an agent, that is, prior to May, 1952, for the General Accident?

A. Yes; I was an agent for General Accident from, I [154] believe, September, 1950, to November, 1952. I would have to check those dates, but that is fairly close.

Q. And as such an agent, did you actually sign the policy for Campagnola on behalf of General Accident?

Mr. Davis: Just a minute. I object to that as incompetent, irrelevant and immaterial, and not the best evidence. They must have the policy. I don't know why it hasn't been introduced.

Q. (By Mr. Miller): I show you the original policy of General Accident——

Mr. Davis: If that is a fact, why don't we do that?

Mr. Miller: No; it is a fact you have the file.

Mr. Davis: I object to counsel's statement of what I know.

The Court: There has been too much bickering and argument in this case thus far. Let's not have any comments and remarks between counsel. Just make your statements. You are both too good at-

(Testimony of Charles Richard Love.)

torneys to be doing this sort of thing. This case seems to somehow have gotten off on the basis of a lot of personal feeling, although, generally speaking, it is the kind of case we like to have turn up here, because it is a relief from having to send people to jail and so on.

Mr. Davis: I assure the court there is absolutely no personal feeling in this matter. I don't like [155] counsel's method and he apparently doesn't like mine.

The Clerk: Plaintiff's 6 for identification.

(The document referred to was marked Plaintiff's Exhibit 6 for identification.)

Q. (By Mr. Miller): I hand you what purports to be an original policy issued by General Accident to Campagnola Food Products, Inc., bearing the date, May 16, 1952, and signed, "Charles Richard Love, Agent," and ask you whether that is your signature.

A. No, sir; that is not my signature. It is signed by my secretary with my permission. However, the initials "G. B. A." appear under this signature.

Mr. Davis: The witness is volunteering the answer to the question——

Mr. Miller: He has a right—I beg your pardon.

The Court: When he said, "That is not my signature," he answered the question.

Mr. Miller: But he explained it was authorized by him, signed by the secretary.

(Testimony of Charles Richard Love.)

The Court: Yes. I am not going to strike it. It could have been elicited by proper questions.

But please, Mr. Witness, when you come to an answer to the particular question, stop. Mr. Miller is smart enough to know what to ask you next.

Mr. Miller: Thank you, your Honor. [156]

The Witness: Yes, sir.

Q. (By Mr. Miller): And I direct your attention to clauses that are appended and endorsements that are appended to this policy bearing the name "Charles Richard Love, Agent," and ask you whether that is your name and if it was put there by your authorization.

A. That is my name and it was put on with my authorization.

Q. This was the original policy delivered to Campagnola in this matter on behalf of General Accident?

A. To the best of my knowledge; yes.

Mr. Miller: May we introduce this, your Honor, in evidence?

The Court: Received.

Mr. Davis: I will object to that. Incompetent, irrelevant and immaterial, not proving or tending to prove any issues in this case, and showing that this policy was written, purports to insure from May 16, 1952, to May 16, 1953, long prior and expired long prior to the happening of the events herein related to.

The Court: What is your theory, Mr. Miller?

Mr. Miller: I also say, your Honor, that there

(Testimony of Charles Richard Love.)
are renewal certificates in connection with this policy, so that it was in effect down to the time of the fire.

The Court: Yes. However, it is not the policy sued [157] upon, so what is the theory upon which you rely to make it something that should be considered by the jury?

Mr. Miller: For the purpose of showing that General Accident at least at some stage of this proceeding recognized Mr. Love as its agent. It is preliminary, your Honor, and I think it is all to be considered by the jury.

Here is a company that treated this man as an agent. As far as Campagnola was concerned, there was no notice that the relationship had been changed.

The Court: It is admitted into evidence.

(The document heretofore marked Plaintiff's Exhibit 6 was received in evidence.)

The Court: Members of the jury, when the court allows something into evidence, I am not ruling how you should treat it because what this evidence proves is always a question for the jury. You should not look to the judge's rulings on admitting or rejecting evidence as bearing upon how you are to consider the evidence that does get in. You are to consider only that evidence which is received and which is not thereafter stricken.

Mr. Miller: May I at this point, your Honor, hand to the jury the Plaintiff's Exhibits 1, 2 and 3?

(Testimony of Charles Richard Love.)

Those were the agency agreements, two of which I read from, together with this insurance policy, for them to inspect?

The Court: Yes. Let's start some exhibits at one place [158] in the jury box and others at another, so we will not have too long a wait here while they read them, and they won't individually be handling several documents at the same time.

Q. (By Mr. Miller): Now, from and after the issuance of this policy by General Accident, did you handle renewals and other clauses in connection with this policy, down to the time of the loss, with General Accident? A. Yes, sir.

Q. Now, I think you related that some time after the issuance of this policy and in 1952 your agency, your own agency terminated with General Accident; is that right? A. Yes, sir.

Q. After the termination of the agency with General Accident, did you continue to do business with General Accident down to August, 1954?

A. Well, Mr. Miller, I continued to handle all the business that existed at the time that was in force. Nothing was canceled.

And on one or two or even perhaps more occasions I transacted business with General Accident; yes.

Q. And that business you transacted from the end of 1952 down through August, 1954, was that transacted in your name or Mr. Klee's name with General Accident?

A. It was transacted in Mr. Klee's name. May I clear that point? [159]

(Testimony of Charles Richard Love.)

Q. If it is explanatory, I trust the court will permit you to explain it if you want to explain your answer.

The Court: I think he had better just answer questions. You can tell Mr. Miller at recess if there is anything that has not been brought out by his questions.

The Witness: All right, sir.

Q. (By Mr. Miller): Now, directing your attention to other business than Campagnola with General Accident during 1954, did you transact other business with General Accident under the name of Mr. Klee? A. Yes, sir.

Q. Now, directing your attention to North American, did you transact any business with North American under the name of Mr. Klee prior to August, 1954? A. Yes, sir.

Q. And starting from what date, sir?

A. Well, I transacted the Campagnola policy in question here in 1952. Then I transacted one other piece of business also for Campagnola with the North American in 1952.

Q. Now, directing your attention to July 30, 1954, did you have any discussion on July 30, 1954, with any representative of Campagnola Food Products with reference to additional insurance?

A. Yes, sir.

Q. With whom? [160]

A. Mr. Ralph Esposito.

Q. Was that by telephone or person?

A. By telephone.

(Testimony of Charles Richard Love.)

Q. Will you please relate what was said on that subject?

Mr. Davis: To which both defendants object as incompetent, irrelevant and immaterial, hearsay, and not binding upon these defendants, no foundation whatsoever having been laid to bind these defendants by any conversation with a third person.

The Court: Overruled. That means you may answer.

The Witness: Yes, sir; on July 30th I called Mr. Esposito at his place of business to discuss another matter, actually, with the bookkeeper. While I was on the telephone after I finished my conversation, Mr. Esposito came on the telephone and in essence he told me, he said, "Dick, go ahead and place that other $50,000.00 of fire insurance which we discussed some time ago."

Q. (By Mr. Miller): Had you previously discussed additional insurance with Campagnola with Mr. Esposito?

A. Yes; on many occasions over a period of two years prior to the fire.

Q. I see. Did you thereafter proceed to place that insurance, that $50,000.00? A. I did.

The Court: How did Mr. Esposito know what premium was [161] to be paid?

Mr. Davis: Pardon me. I didn't hear your question?

The Court: How did Mr. Esposito know what premium was to be charged for the policy which was to be placed?

(Testimony of Charles Richard Love.)

The Witness: Your Honor, there was no definite discussion as to premium. However, the premium would have been charged exactly as the original policies had been written, at the same rate.

The Court: What do you mean by "original policies"?

The Witness: Well, sir, there were two policies in force, and the rates on a fire insurance risk are the same for all companies, so any additional insurance that he would have purchased would have been at the same rate structure, and therefore the same premium as what I already had in existence.

Q. (By Mr. Miller): Did you thereafter prepare any memoranda or letters directed to General Accident? A. Yes, sir.

Q. I show you what has been marked Plaintiff's Exhibit 4 for identification, and ask you to examine that. A. (Witness complies.)

Q. As well as Plantiff's Exhibit 5 for identification, a memorandum addressed to Insurance Company of North America.

A. (Witness complies.) [162]

Q. And I ask you to examine them.

A. Yes.

Q. Did you prepare those? A. Yes, sir.

Q. On what date did you prepare those?

A. They were prepared on Sunday evening, July 31st.

Q. Well, my looking at a calendar indicates that July 31st was on a Saturday.

(Testimony of Charles Richard Love.)

A. Excuse me. Then it would have been Sunday, August 1.

Q. Did you prepare those memoranda yourself?

A. I did.

Q. And would you tell us what you did with those memoranda, Plaintiff's Exhibits 4 and 5?

A. I prepared them and placed them in appropriate envelopes and carried them to work with me on Monday morning and deposited them in the mailbox in the lobby of my office building.

Q. When you say "appropriate envelopes" what do you mean by that, sir?

A. I mean either self-addressed envelopes to the companies or properly addressed envelopes to the companies.

Q. Well, when you say "companies" do you mean the General Accident and North American?

A. Yes; those two companies. [163]

Q. And when did you mail those, sir?

A. I mailed them prior to 10:00 o'clock on Monday morning, August 2nd.

Q. Now, I direct your attention—were these documents ever returned to you? A. No.

Q. Did you later learn they were received by the respective companies? A. Yes, sir.

Mr. Miller: We offer these documents in evidence, your Honor.

The Court: May I see them?

The Witness: Yes, sir.

The Court: The documents are received in evidence and you may read them or pass them to the

(Testimony of Charles Richard Love.)

jury. If they are passed to the jury, however, the jury are cautioned there are some things blotted out from these, by having paper put over them. You are not to look under those papers to see what is there.

Mr. Davis: Could I look at them?

The Court: Certainly.

Mr. Davis: I assume they were what we looked at last night. Counsel did not submit them to me.

Mr. Miller: I haven't had them. They have been with the clerk, in the clerk's possession. [164]

Mr. Davis: That is all right. I am not criticizing you.

Do you want to hand them to the jury?

Mr. Miller: Since they are both short, may I hand them both to one juror to pass along, your Honor?

The Court: Yes. These are short, so each juror can look at both exhibits at once.

(The documents heretofore marked Plaintiff's Exhibits 4 and 5 were received in evidence.)

PLAINTIFF'S EXHIBIT No. 4

(Received in evidence 6/19/56)

Love Insurance Agency
510 W. Sixth Street
Los Angeles 14, California

To: Gen. Acc.

Subject: Campagnola #784651.

Attention:

(Testimony of Charles Richard Love.)

Date: 8-3-54.

Will you increase your line by endorsement to $25,000 part of total line of $88,000. Advise immediately.

DICK LOVE.

PLAINTIFF'S EXHIBIT No. 5

(Received in evidence 6/19/56)

Love Insurance Agency
510 W. Sixth Street
Los Angeles 14, California

To: Ins. Co. North Am.

Subject: Campagnola #61296.

Attention: Fire Und.

Date: 8-3-54.

Will you endorse to increase your line to $27,000, part of total line of $88,000. Advise immediately.

K. H. KLEE.

Q. (By Mr. Miller): Mr. Love, these two documents bear the date August 3, 1954, which was on a Tuesday, and your testimony is that you mailed them Monday, August 2, 1954.

A. That is correct.

Q. Will you explain the difference in dates?

A. When I issued these memos, I had a small desk-pad calendar on my desk. It is an advertising mailer I send out, and I had quite a number of

(Testimony of Charles Richard Love.)

them left over from 1953, and I purchased fillers for 1954, to mail them out to my accounts.

I looked at this calendar and saw that Monday was dated August 3rd. However, I discovered later that I was looking at one of the old calendars which my wife had put up on the desk, which still had the 1953 filler in it, which said that August 3rd was on Monday, however, when in fact August 2nd was on Monday.

Consequently, through error I dated my memos August 3rd, [165] when they should have been dated August 2nd.

Q. Now, I would like to interrogate you as to your experience in the business and your knowledge of custom in the insurance field.

Have you been actively engaged in the insurance business for at least in excess of five years?

A. Yes, sir. It is my only occupation.

Q. Are you familiar with the custom, if any, as to insurance companies responding to requests and communications of this kind sent to insurance companies? A. Yes, sir; I am.

Q. And was there in August, 1954, such a custom in this community?

Mr. Davis: I will object to that as incompetent, irrelevant and immaterial. It could not prove to establish a contract by custom, and wholly immaterial, what any custom——

The Court: You can't establish a contract by custom, but you can establish the custom if it exists,

(Testimony of Charles Richard Love.)

and can show what it is so that the other evidence can be properly appreciated in the light of whatever the custom is.

So the objection is overruled.

The Witness: Will you read the question, please?

(The question was read.)

The Witness: Yes; I would say so.

Q. (By Mr. Miller): I direct your attention to the [166] language in these Plaintiff's Exhibits 4 and 5, one to General Accident and one to North American, where at the end you say, "Advise immediately."

Can you tell us what was the custom in Los Angeles in the insurance business with reference to the time within which an insurance company should notify when advised—when requested to advise immediately, whether or not it has objections to the increased line?

Mr. Davis: I object to that. It is incompetent, irrelevant and immaterial, and argumentative, your Honor, the question of what "Advise immediately" means. It is a question of common knowledge. The witness can't say whether it means one minute, one hour, a second, or a day or two.

The Court: The witness is asked regarding the custom of insurance companies. He has testified there is a custom and he knows what it is, so he may answer.

The Witness: The custom will vary some between any number of companies, but——

(Testimony of Charles Richard Love.)

Q. (By Mr. Miller): Do you know what it was with respect to these particular companies? If you don't, why, say so and that will end it. If you know what it was with respect to these particular companies, that is the custom in which we are interested.

A. I can honestly say I don't know what it was with these particular companies, but I know what it is in the [167] trade in general.

The Court: You may answer with respect to what it was in the trade in general.

The Witness: The custom and practice in the insurance trade in a general manner is that when an insurance company has a request for any type of coverage they do not desire or positively will not issue, that they at once notify you with a telephone call, followed by a written letter of declination.

Q. (By Mr. Miller): And was that done, did you receive any telephone call from General Accident from August 2, 1954, to the date of this fire on August 7, 1954?

A. No, sir; I had no communication whatsoever from them.

Q. Either by telephone or by letter; is that correct? A. Either.

Q. All right. Now, did you receive from August 2, 1954, to August 7, 1954, any telephone call, any letter or telegram from North American, informing you that it declined this risk?

Mr. Davis: Just a minute. He said he received none whatsoever. Whether it declined or accepted

(Testimony of Charles Richard Love.)

or what, if he didn't receive it he didn't receive anything.

The Court: Overruled. It is somewhat repetitious.

The Witness: I didn't actually receive any communication [168] from North American; no.

Q. (By Mr. Miller): The total additional increased coverage with reference to General Accident was what sum, sir, that you requested?

Mr. Davis: I object to that. The instrument speaks for itself; it is plain.

Mr. Miller: I think it——

Mr. Davis: Interpreting it beyond its terms.

Mr. Miller: I think it merits explanation from the witness, because the document refers to increase to $25,000.00. There is no reference to what the policy amount was, and I think the witness is merely presenting to the jury here an explanation of the increased insurance that was involved.

The Court: Objection overruled.

The Witness: Mr. Miller, without looking at the file I couldn't tell you exactly what the original policy was, and consequently I can't tell you exactly what the amount of the increase requested was.

Q. (By Mr. Miller): Well, I show you the original policy of General Accident.

A. The requested increase was for $14,000.00.

Q. Now, do you recall what the requested increase amounted to with North American?

A. Same situation applies. I would have to look at the original policy. [169]

(Testimony of Charles Richard Love.)

Q. If the original policy was for $12,000.00——

Mr. Davis: That is argumentative. Counsel is making a statement. He could produce that policy. I don't know why he doesn't do it.

Mr. Miller: It is admitted in this case, it has been admitted by Mr. Davis in his opening statement, and admitted in the entire case it was $12,000.00 for North American.

Mr. Davis: Then it is $12,000.00. Why don't you——

The Court: Under the circumstances there is no vice in the question. Proceed.

The Witness: Increase requested from the Insurance Company of North America was then for $15,000.00.

Q. (By Mr. Miller): So there was a total of fifteen for North American and fourteen for General Accident; a total of $29,000.00; is that correct?

A. Yes, sir.

Q. I think in your testimony of discussion with Mr. Esposito there was reference to a total of $50,000.00; is that correct? A. That is correct.

Q. What happened to the other $21,000.00?

A. The balance was requested from the Insurance Company of the State of Pennsylvania through their representative and general agent, Seeley & Company.

Q. That is not involved in this case at all; is that [170] right?

A. That is correct, to my knowledge.

Q. Now, with reference to the term or the dura-

(Testimony of Charles Richard Love.)

tion of this additional coverage, was it to be for the same period of time as the term of the insurance policy?

Mr. Davis: Just a minute, now. I object to that. The instrument speaks for itself. Counsel is getting right into the argumentative feature of this case. The witness can testify to what was said, but can't call on his conclusion here.

The Court: He may testify as to what was said, and he may testify as to any custom of which he knows existed on the part of these companies. But he cannot draw the conclusion which you have asked for.

Q. (By Mr. Miller): Was there a custom in the insurance business that when there was an increase in insurance, as to whether or not the term of that increased insurance coincided with the original policy as renewed?

A. Yes, sir; there is a definite custom.

Q. And that applies to both of these increases; is that right? A. Yes, sir.

Q. Now, with reference——

The Court: What is that custom? You didn't ask him what that custom is. We have your inquiry and he says there [171] is a custom. Let's find out from him what it is.

Mr. Miller: Thank you.

Q. (By Mr. Miller): Please relate what the custom is in that respect.

A. Unless the agent requests specifically to the contrary, or for some reason a specific term, it is

(Testimony of Charles Richard Love.)

always customary to add increases on to run to the normal expiration of the original policy term.

Q. Now, with reference to the effective date of the increased insurance, was there a custom in August, 1954, as to when the increased coverage would run from?

Mr. Davis: The court please, I am going to again object to that. You cannot establish a contract or the terms of a contract by custom.

What took place, what was the agreement is what we are talking about here, if any.

The Court: Overruled.

Mr. Davis: It is all in the realm of speculation, possibility.

The Court: Overruled. The question was, was there such a custom. If you answer yes, the next question would be, what is that custom?

You are only answering whether there was a custom, now.

Q. (By Mr. Miller): Do you understand the question, Mr. Love? [172]

A. Could you repeat it or rephrase it? I don't quite follow.

Mr. Miller: With the court's permission, may it be read?

(The question was read.)

Q. (By Mr. Miller): That is, the effective date.

A. Yes; I would say there is a custom.

Q. Was there such a custom in August, 1954?

A. I would say yes.

(Testimony of Charles Richard Love.)

Q. Will you please relate what that custom was?

Mr. Davis: The court please, I am again going to object. Another thing I want to object to, it was stipulated—it was made a part of the pleadings herein, and ruled that the transactions relating to these alleged oral contracts were separate and apart from the written contracts. Now he is relating his testimony to an alleged custom of continuing the original insurance. The agreement and stipulation, motions were made to separate, and the court granted the motions so that these things wouldn't occur.

He is talking about a custom relating to the old policies, the written policies, upon which the obligation has been paid and discharged.

The Court: Overruled.

The Witness: It is customary to enforce a policy, regardless of the nature of the enforcement, as of the date shown upon the order or as of the date specifically requested [173] in the context of the memorandum itself.

Q. (By Mr. Miller): In connection with General Accident, prior to August, '54, were there cases involving Campagnola where the enforcement, we will say, was dated May 25, 1953, but was effective, we will say, May 15th, ten days before?

A. Yes, sir; I believe so.

The Court: Do you know what the custom was with respect to charging premium?

The Witness: The premium would commence the

(Testimony of Charles Richard Love.)

same way, either as of the date the memorandum was requested and the endorsement issued, or as of the specific date referred to in the context of the memorandum.

Q. (By Mr. Miller): I am not clear on that. By that you mean——

The Court: Let him tell it.

The Witness: If I wrote a memorandum to an insurance company and said, "Effective September 1st, such and such a year, please endorse as follows," that endorsement would be issued as of that date, whether I ordered it prior to September 1st or after September 1st.

On the other hand, if I send a memorandum to an insurance company which had no specific reference to date, the custom and practice is that they would endorse the policy as of the date noted on my memorandum.

Q. (By Mr. Miller): Now, with reference to the property [174] that was insured under this increased line of insurance or coverage, what was the property that was insured?

A. Under the increased portion?

Q. That is right.

Mr. Davis: I am objecting again. There is no increase of insurance involved in this case, both by stipulation and order of the court and the pleadings. We are talking about the initiation and consumation of an oral contract of insurance. I object to any testimony as to custom of increasing another policy.

(Testimony of Charles Richard Love.)

The Court: The question is objectionable on another ground. It calls for a conclusion of the witness.

On the ground stated by Mr. Davis, it is overruled.

On the ground stated by the court, it is sustained.

Mr. Miller: All right.

Q. (By Mr. Miller): Was there a custom in August, 1954, that when there was a request from a customer for additional insurance, as to what equipment or property would be covered by that additional insurance

Mr. Davis: That is very leading and suggestive, and I will object on that ground.

The Court: Overruled.

The Witness: I would have to say no, Mr. Miller, there wouldn't be any custom. In other words, I can't be a mind reader, I have to know what the man wants insured.

Q. (By Mr. Miller): Did you know on July 30, 1954, what [175] Campagnola wanted insured when they asked for the additional coverage?

A. Yes, sir.

Q. What?

A. Additional coverage on his equipment in his plant.

The Court: We will take our morning recess.

(Whereupon, a recess was taken from 10:45 o'clock a.m. to 11:07 o'clock a.m.)

The Court: All parties present, you may proceed.

(Testimony of Charles Richard Love.)

Mr. Miller: Your Honor, I have submitted to counsel a calendar taken from my office book for 1954. We thought, or, I thought it might be of assistance to the jury, and I understand from Mr. Davis there is no objection to the introduction of this calendar.

Mr. Davis: None. A calendar is a calendar. I have no objection to it as a calendar.

Mr. Miller: May we have this introduced in evidence, this calendar?

The Court: Received.

The Clerk: Plaintiff's 7.

(The calendar referred to was marked Plaintiff's Exhibit 7 and was received in evidence.)

Mr. Miller: Cross-examine. **[176]**

Cross-Examination

By Mr. Davis:

Q. Mr. Love, you say you have been in the insurance business how long?

A. Approximately eight years.

Q. How many?

A. Approximately eight years.

Q. And that is from the time you first started?

A. Yes, sir.

Q. You weren't a full-fledged insurance man when you first started? You started to learn about eight years ago, is that it? A. That is right.

Q. And you went to work for somebody else, I assume? A. Yes, sir.

(Testimony of Charles Richard Love.)

Q. Who was your first employer?

A. Seeley & Company.

Q. In the insrance business? A. Yes, sir.

Q. And what type of work did you do, first do?

A. I was an underwriter for them.

Q. On what lines?

A. Practically everything, except fire insurance and personal property floaters.

Q. Mostly casualty, wasnt it? [177]

A. Yes, sir.

Q. How long did you work for Seeley?

A. Approximately a year.

Q. And where did you go?

A. I went to work for another broker.

Q. Who was the broker?

A. It was the Ziegler Insurance Agency.

Q. What happened to the Ziegler Insurance Agency, are they still in existence?

Mr. Miller: We object to that as being immaterial, as to what happened to them.

Mr. Davis: I want to find out who they were and how——

The Court: Overruled.

Q. (By Mr. Davis): Do you know, are they in business or out of business now?

A. To my knowledge they are out of business now.

Q. How long did you work for them?

A. Only a few months.

Q. Then where did you work?

(Testimony of Charles Richard Love.)

A. I started business for myself.

Q. And was that officing with Mr. Klee?

A. Yes, sir.

Q. Where were you located?

A. 510 West 6th Street.

Q. Are you still there? [178]

A. Yes and no.

Q. Well, that is like a lot of the other answers here. What do you mean by that?

A. I still use that as my office, my mailing address. I still maintain a telephone there and I go in there every day. My actual work is transacted from my house.

Q. Where do you live?

A. 10315 South Julius Avenue in Downey.

Q. What was the date when you first started in business for yourself?

A. As near as I can remember, it was about June or July of 1950.

Q. When did you take your examination for an agent's license, if you did take one?

A. Approximately the same time.

Q. You were licensed at that time? A. Yes.

Q. Approximately June, 1950? A. Yes.

Q. Were you appointed agent for any insurance company about that time? A. Yes, sir.

Q. And what companies were you appointed agent for?

A. I can't recall right offhand, Mr. Davis. I believe my appointing company was Seeley & Com-

(Testimony of Charles Richard Love.)

pany, my ex-employer. [179] Other than that I was appointed from time to time by other companies.

Q. Well, certainly, with your memory you can tell us what companies you represented from time to time.

A. At the outset, at the beginning of the business?

Q. At the beginning of the business and continuing.

The Court: He says "from time to time."

Mr. Davis: Yes.

The Court: So it gives you a latitude.

The Witness: I believe that I was originally appointed for Seeley & Company, and I was then appointed for Argonaut. I was then appointed for the General Accident, the National Union.

Q. (By Mr. Davis): You were appointed for General Accident the latter part of 1950, were you not?

A. In the fall, in September, I believe.

Q. 1950. Your agency agreement with the General Accident was canceled in November, 1952?

A. That is correct.

Q. You received a notice from the Insurance Commissioner that your agency with the General Accident was canceled, did you not?

A. That is correct.

Q. As of that date, 11-21-52?

A. I assume that date is correct. [180]

Q. From that time on you ceased to be agent for the General Accident; is that correct?

(Testimony of Charles Richard Love.)

Mr. Miller: We object to that as calling for a conclusion of the witness. I think the facts themselves will indicate what the relationship was from that point on to the present time.

Mr. Davis: I will ask it another way.

Q. (By Mr. Davis): Were you ever reappointed by the General Accident after your cancellation of your agnecy?

The Court: I see counsel is about to object again. I take it that your question means fromal reappointment?

Mr. Davis: Or reappointed by any agent of the general agent—of the agency. There is only one method you can be appointed an agent in the State now.

Mr. Miller: May we be heard in that regard?

The Court: Yes.

Mr. Miller: We don't agree with counsel's statement there is only one method. It can be by act and conduct, ratification. It needn't be by formal appointment to the extent counsel asks for something other than your Honor has indicated a formal appointment. We feel it calls for a conclusion of the witness.

The Court: I think it does.

Mr. Davis: Let me ask him if he was ever appointed agent for the General Accident. I say appointed. I am not talking [181] about what counsel is talking about.

Q. (By Mr. Davis): Were you ever appointed

(Testimony of Charles Richard Love.)

agent for the General Accident after this termination of 11-21-52?

Mr. Miller: Your Honor, do I understand that only includes a formal appointment, a written appointment?

Mr. Davis: I am not limiting it to formal appointment, if I know what counsel means by "formal appointment." By the drafting of an agreement and the sending of notice to the Commissioner, and those things. I am not limiting it to that.

I am asking him if he was ever appointed as an agent by any officer or executive of the General Accident Insurance Company.

Mr. Miller: We object to that, your Honor, as it calls for a conclusion of the witness here insofar as it goes beyond a formal written or oral appointment.

The Court: Sustained.

Mr. Davis: Did your Honor sustain the objection?

The Court: Yes.

Q. (By Mr. Davis): Were you ever after your agency was canceled given a written—withdraw that for a minute.

When you were first appointed by the General Accident you were given a written agency agreement? A. That is correct.

Q. And you signed it and an executive of General [182] Accident signed it?

A. That is correct.

Q. After your agency was canceled, did you ever sign any written agreement, agency agreement?

(Testimony of Charles Richard Love.)

A. No, sir.

Q. Did you ever cause or have to be caused or you yourself file any notification with the Insurance Commissioner that you were an agent of the General Accident, after the cancellation of your agency?

A. No, sir.

Q. Did you ever state to anybody or represent in any manner to anybody, after that agency was canceled, that you were an agent of the General Accident?

I will withdraw the question and put in two——

A. I was trying to think of a proper answer.

Q. I think it is a double question, that is the reason. I want to get this very specific.

Did you ever state to anybody, after this agnecy was canceled, that you were an agent of the General Accident?

A. I don't believe I ever told anybody specifically that I was an agent.

Q. Well, then, if you didn't tell them specifically, did you ever hold yourself out to anybody as being an agent for the General Accident, after this agency was canceled?

Mr. Miller: We object to that as calling for a conclusion [183] of the witness.

The Court: Overruled.

The Witness: I held out to people, I believe, from time to time that I could place business with General Accident. But I did not hold out I was an appointed agent of that company.

(Testimony of Charles Richard Love.)

Q. (By Mr. Davis): That you had authority to bind the General Accident?

A. I don't think that question ever came up.

Q. Well, then, you never held yourself out to anybody as having authority to bind the General Accident by your acts, after your agency was canceled, did you? A. Probably not; no.

Q. And when you represented to people that you could place business with the General Accident, you did it in accordance with the authority which you had under your broker's license, did you not?

Mr. Miller: Objected to as calling for a conclusion of the witness.

Mr. Davis: I think it is not. We are going right into——

The Court: Overruled.

The Witness: No, sir, I did not hold out I could handle it as a broker.

Q. (By Mr. Davis): You held out simply that you could place it with them? [184]

A. That is right.

Q. Now, will you explain to us what you mean by placing it with the company?

A. Well, by placing I mean to offer a piece of business to a company and have them accept it and issue a policy, and the necessary steps.

Q. And you do that with various companies, other companies besides the General Accident?

A. Yes; sometimes.

Q. In other words, you have the companies which you represent as agent——

(Testimony of Charles Richard Love.)

A. That is right.

Q. ——and which you have an agent's authority to bind—— A. That is correct.

Q. ——and when you cannot or for some reason do not wish to place your business in a company for which you have been duly appointed an agent, and for whom you have authority to bind, then you place it with some other company that you do not represent, it that it? A. That would be correct; yes.

Q. And in doing so, you mean by that you submit it to the other company for their acceptance or rejection; is that correct?

A. In most instances; yes, sir.

Q. What do you mean by "in most [185] instances"?

A. In many instances I submit my business to Mr. Klee with—or submit it directly under his name with his authorization.

Q. You mean submit it directly under his name, with his authorization, to companies that he represents? A. That is correct.

Q. Let me ask you, did you state to Mr. Espinoza that you could bind and did bind the General Accident? A. No, sir; I did not.

Q. Did you state to Mr. Espinoza you could and did bind the Insurance Company of North America?

A. No, sir; I did not.

Q. Did you state to Mr. Espinoza at any time prior to the fire that he was insured in any of these companies? A. No, sir.

Q. He asked you to increase the insurance and

(Testimony of Charles Richard Love.)

you said that you would see what you could do, and you would make your applications to these insurance companies?

Mr. Miller: Just a moment. We object to that as assuming——

Mr. Davis: Please——

Mr. Miller: ——a fact not in evidence.

Mr. Davis: I am cross-examining this witness.

The Court: Please let Mr. Miller state his objection, and then I will hear from you before ruling, unless I feel [186] that I should rule against Mr. Miller without it.

Mr. Miller: We object to the question, your Honor. First, it is a compound question and it assumes facts that are not in evidence. And it assumes things this witness has not testified to nor has any other witness testified to.

The Court: The objection is overruled. This is cross-examination and counsel may lead to any reasonable extent.

However, Mr. Witness, you should listen to the question and be careful that you are just saying yes or no to something you don't understand. If you don't understand a question, you say so, and Mr. Davis will then break it down for you.

Mr. Davis: Will you read the question?

(The question was read.)

Mr. Davis: Let me withdraw that question. I gave the wrong name.

Q. (By Mr. Davis): It is Esposito?

(Testimony of Charles Richard Love.)

A. Yes.

Q. Mr. Esposito was the man you dealt with in Campagnola Food Products? A. Yes.

Mr. Davis: If I said "Espinoza" or something like that, I meant Esposito.

The Court: Did you understand who he was referring to in his previous questions? [187]

The Witness: Yes, sir; I understood who he meant.

Q. (By Mr. Davis): Your discussion with Mr. Esposito on the 30th of July you said had followed a preceding discussion? A. That is correct.

Q. In that preceding discussion he told you that he was borrowing money or giving a mortgage or something, and he might need some more insurance later, isn't that the substance of what took place?

A. Yes; in effect.

Q. Then on July 31st he telephoned you and told you that he would like to have additional $50,000.00 insurance?

A. I believe he said the deal we had discussed had gone through and he wanted the additional insurance we had discussed.

Q. You stated to him that you would immediately make application to insurance companies, to see if you could place the business, didn't you, or something to that effect?

A. Something in that vein; yes.

Q. You didn't tell him what companies you were going to make applictaion to for him?

A. No, sir.

(Testimony of Charles Richard Love.)

Q. And you didn't tell him when the contract, if any were made with any companies, would go into effect? A. No, sir. [188]

Q. You didn't tell him how that $50,000.00 was to be divided between any companies, if you could place it? A. No, sir.

Q. And you didn't discuss with him when the insurance would—for how long the insurance would endure, the terms, the end of it?

A. No; not specifically, I did not.

Q. You didn't discuss with him the rate?

A. No, sir.

Q. You didn't discuss with him or even get from him the name of the parties, that is, the loss payees who were to be placed upon the policies, did you?

A. He made no mention of it, and I didn't ask him about it; I wasn't aware——

Q. He told you previously he wanted the additional insurance because the loss payees would be demanding it, had he not?

A. No; he didn't put it that way.

Q. How did he put it then?

A. I had lunch with him and he told me he was making a deal to do some refinancing in his organization, and if this deal went through they probably would want additional insurance. He didn't specifically refer to the fact there would be any loss payables involved or how the money was to be arranged, or anything else. I knew nothing of [189] the details of it.

(Testimony of Charles Richard Love.)

Q. You assumed that the loss payables would have to go on the policies——

Mr. Miller: I object——

Mr. Davis: Let me finish. ——from the tenor of the conversation you had with Mr. Esposito?

Mr. Miller: I object to that as calling for a conclusion of the witness.

The Court: Read the question.

(The question was read.)

The Court: Overruled. If you know what he is asking——

The Witness: I know what he is asking, sir.

The Court: All right.

The Witness: No; I didn't assume anything as respects that. I didn't know what his financial condition was or his arrangements were going to be. I had no reason to come to the conclusion there would have to be a loss payable.

Q. (By Mr. Davis): May I refer, and let me ask you in specific language, "I was told some financial rearrangements were in process and pending, and advised that the fire insurance probably would have to be increased as there would be loans involved and the lenders would want additional protection. He did not state who the lenders would be, but advised me that he would let me know if the increase was to be made." [190]

That is in substance what took place at your meeting with him before——

A. That is correct.

(Testimony of Charles Richard Love.)

Q. Now, did you make any requests to any other companies, other than these three companies, that is, the Insurance Company of North America, the General Accident, and the Insurance Company of the State of Pennsylvania, which you testified to, along the lines as indicated by—correction——

Mr. Davis: May I have Exhibit 4? I think it was 4.

The Witness: I believe I have it here.

The Clerk: It is on the witness stand.

Mr. Davis: Oh.

Q. (By Mr. Davis): Let me put it this way—let me withdraw that question—did you make any inquiries of or communicate along the lines that appear in the language of these Plaintiff's Exhibits 4 and 5, that is, along the lines, "Will you increase your line—" or did you—you didn't have any other companies on the line except these three; is that right?

A. Those three were the only ones on this specific coverage.

Q. Now, did you make any inquiry from anybody else, any other insurance company, as to whether or not they would take part of this requested $50,000.00? [191]

A. Not originally; no.

Q. Not originally. What do you mean "not originally"?

A. Well, I mean at the time I wrote those memos those were the only three memos that were written.

(Testimony of Charles Richard Love.)

There was no inquiry by phone or mail to any other carriers.

Q. Not originally. Did you later make inquiry from someone else? A. No, sir; I did not.

The Court: Did Mr. Esposito ever tell you with what companies he wanted the additional coverage?

The Witness: No, sir; he did not.

The Court: Did you ever tell him which companies you were going to place it with?

The Witness: No, sir. To the best of my knowledge I don't believe I did.

Q. (By Mr. Davis): Mr. Esposito was the only man you negotiated with regarding insurance at Campagnola?

A. That is right, with the exception of the bookkeeper occasionally, and related matters, coverage was handled with Mr. Esposito.

Q. How much of Campagnola's line did you handle or carry? I mean through—let me withdraw that. That is a little awkward.

You were handling and had taken over the handling of all his insurance prior to this [192] episode? A. Not all, but the major portion of it.

Q. You started to take over his insurance in 1951? A. That date is approximately correct.

Q. You gradually, as policies expired and other agents—you took over the business of other agents or brokers? A. That is correct.

Q. And that line consisted of several, quite a number of locations and types of risks?

A. Just one location.

(Testimony of Charles Richard Love.)

Q. That was the place where the fire occurred?

A. Yes. And previous to that they had been located in another building. But they had moved their plant completely out there.

Q. Previous to their move to the place where the fire occurred, all their activities were in one location? A. In one location.

Q. Did they have some field work? I notice your insurance——

A. That is right, with the exception they had to go pick tomatoes and lug them into the plant.

Q. Their operations were all——

A. Their principal operation was in one location.

Q. And that originally was in a sprinkler building where——

A. I believe it was 4530 Worth Street. [193]

Q. In 1951 you had negotiated the insurance for that building? A. That is correct.

Q. And that was, so far as the General Accident was concerned, that was the policy which you have identified here? A. Yes, sir.

The Clerk: I believe it is before the witness.

The Witness: I am sorry.

Q. (By Mr. Davis): That is Plaintiffs Exhibit 6? A. That is correct.

Q. And when that policy expired in May of 1953 according to its terms, the 16th of May, 1953—am I right—— A. Yes; I believe so.

Q. ——were there other policies? Was the Insurance Company of North America policy expiring about the same time, or do you know?

(Testimony of Charles Richard Love.)

A. I couldn't say for sure, Mr. Davis, without looking at the file.

Q. The General Accident policy expired and you were no longer agent of the General Accident? Your agency had been canceled; is that correct?

A. That is correct.

Q. You, of course, would be forced to place it through some other agent then, if you placed it with the General Accident? [194]

A. I wouldn't say "forced"; no.

Q. You were forced by law. You know your agency duties.

Mr. Miller: We object to that as calling for a conclusion of the witness and being argumentative.

The Court: Sustained.

Q. (By Mr. Davis): You couldn't write a policy in the General Accident after your agency had expired, could you, and sign it?

A. No; I couldn't write it and sign it.

Q. So you placed the insurance that was expiring in the General Accident through Mr. Klee as agent for the General Accident; is that correct?

A. That is correct.

Q. Now, did you have through your instrumentality there as an agent or broker, did you have any other insurance on Campagnola besides this General Accident policy which we have just looked at, and the Insurance Company of North America policy and the Insurance Company of the State of Pennsylvania policy, at the time of the writing of these memorandums to these companies?

(Testimony of Charles Richard Love.)

A. Yes, sir; I had other companies—other forms of business for that account.

Q. What type, roughly what were the other coverages?

A. Well, there was a comprehensive liability policy [195] that covered all their vehicles and all their public liability.

Q. Do you recall what company that was written in?

A. It was probably either with Republic Indemnity or the Century Indemnity at the time; I am not sure.

Q. Were you an authorized agent of those companies at the time, or was it business you brokered?

A. I would have been an authorized agent.

Q. If you placed it in a policy, it would be one you issued as an agent yourself and not a broker?

A. Yes, sir.

Q. You know what I mean by "broker"?

A. Yes, sir.

Q. Maybe you can explain it to the jury. I can't do it. What do you mean by brokering? I mean, I am not permitted to. I think I know what it is.

A. Well, basically speaking, an agent is supposed to represent the company. A broker is supposed to represent the insured.

But, practically speaking, it is a duel capacity in either instance.

Q. A broker doesn't execute or deliver policies, does he? He procures the policies through an agent

(Testimony of Charles Richard Love.)

or direct from the company; isn't that about the substance of it?

A. Either from an agent or direct from the company himself. [196]

Q. Now, what other insurance did you have with Campagnola?

A. Well, I had some insurance on lug boxes.

Q. In what company was that?

A. The New Hampshire.

Q. Were you an agent, authorized agent for New Hampshire at that time?

A. No, sir. That was placed through Mr. Klee.

Q. You had placed that through him as an agent for the New Hampshire? A. Yes, sir.

Q. And what other insurance did you have?

A. I had his workmen's compensation. I believe that was with the Zenith at the time.

Q. Were you an agent for the Zenith, or broker?

A. I was an agent. I had some business through the Phoenix Assurance, also, I believe, on lug boxes. And I had, I believe, an accident and health policy and some other miscellaneous coverage. I can't recall right offhand. It has been too long.

Q. There had been a provisional reporting stock policy on this risk? A. That is correct.

Q. And that had been written in the Insurance Company of North America first? [197]

A. I can't testify to that.

Q. Well, did you take over the writing of that provisional reporting policy? A. I did.

Q. And when did you take it over, approxi-

(Testimony of Charles Richard Love.)

mately? A. I couldn't——

Q. With reference to the fire.

A. I couldn't say exactly, but I think it was probably about 60 to 90 days prior to the fire, which would have been around May or June.

Q. And you placed that with what company?

A. The National Union.

Q. Did you broker that or were you an agent of theirs? A. I was an agent.

Q. You were aware, when you took it over, that the Insurance Company of North America had canceled?

A. No, sir; I wasn't aware. I was aware they had been on the risk. Why it was terminated I don't know. Mr. Esposito just told me to take it over and write it as of a given date, and told me who the loss payables would be on the policy, which happened to be a bank in San Francisco. And I followed his instructions. As to why or how it had been terminated with North American, I actually didn't have any definite knowledge at the time.

Q. Did you ever learn that that policy had [198] been canceled for nonpayment of premium?

Mr. Miller: We object to that as being immaterial and improper cross-examination. It tends to confuse the issues.

The Court: Sustained.

Mr. Davis: May I be heard on the reason for it, your Honor?

The Court: Yes.

Mr. Miller: May I——

(Testimony of Charles Richard Love.)

Mr. Davis: It is the improbability of a company accepting a risk from an assured where they previously had to cancel a large policy for nonpayment of premiums. I think that is quite material.

The Court: I think if I allowed an answer to the question in this case and this case ever went to the higher court, they would write a nice little paragraph rebuking me for letting you.

Mr. Davis: As long as you are protecting my record, I will withdraw the question, your Honor. I will establish it——

Mr. Miller: May I address the court?

The Court: There is nothing before the court.

Mr. Miller: I would like to ask the court to advise the jury, or I put the question to the court, whether it wouldn't be advisable at this point to ask the jury to disregard the statement of counsel or they should not consider it as [199] evidence in in the case.

Mr. Davis: I stated I am withdrawing every reference to it.

The Court: All right. What Mr. Miller is asking me to tell you is what I should tell you, so consider it said by the court.

Q. (By Mr. Davis): Now, getting back, this one conversation that we have referred to that you had with Mr. Esposito, that was the last conversation until after the fire, was it not, with him?

A. Telephone conversation on July 30th was the last conversation I had with him, until after the fire occurred.

(Testimony of Charles Richard Love.)

Q. You didn't make any effort or attempt to place this insurance on July 30th?

A. No, sir; that is true.

Q. Or July 31st?

A. That is true. It was a Saturday and the companies were closed.

Q. Saturdays most of the companies were closed? A. All the companies were closed.

Q. They were all. All but the lawyers' offices, I guess.

On Monday, which was the 2nd of August, you mailed these inquiries?

A. That is correct. [200]

Q. And similar ones to the Insurance Company of the State of Pennsylvania, I assume?

A. All three of them went at the same time.

Q. Although theye are dated the 3rd of August—— A. That is true.

Q. ——it is your recollection now they were mailed on the 2nd?

A. If Monday was August the 2nd, I am positive they were mailed on August 2nd.

Q. Now, you were advised a telephone call had come in to you on Wednesday or Thursday of that week from Mr. Sparks of the Insurance Company of North America, were you not?

A. That is correct.

Q. And you were not in?

A. No, sir, I wasn't at the time.

Q. What did you do when you heard of the call?

(Testimony of Charles Richard Love.)

A. I returned his phone call and he wasn't in.

Q. Then did you get another call from him?

A. Yes, sir, I had one again on Friday morning.

Q. And you weren't in? A. I wasn't in.

Q. Then you called him back and he wasn't in.

A. That is correct.

Q. And then he called you once more and you weren't in?

A. The third time on Friday afternoon, and I called [201] him back and he was not in.

Q. Has it occurred to you there must have been some reason for this call?

Mr. Miller: We object to that as calling for a conclusion of the witness and self-serving, and immaterial.

Mr. Davis: These things have been very self-serving, but not for us. I asked him if it occurred to him there was some reason for these calls.

Mr. Miller: Regardless——

The Court: Sustained.

Q. (By Mr. Davis): Did you have any reason to know what these calls from Mr. Sparks were about? A. None.

Q. You didn't assume they had anything to do with this matter then?

Mr. Miller: We object to that as calling for a conclusion of this witness and being speculative.

The Court: Sustained.

Do you know who Mr. Sparks was?

The Witness: No, sir, I didn't know who Mr. Sparks was at that time.

(Testimony of Charles Richard Love.)

Q. (By Mr. Davis): Were you advised that the call was from Mr. Sparks of the Insurance Company of North America? A. Yes, sir.

Q. When you called back the first time the Insurance [202] Company of North America, did you ask who Mr. Sparks was? A. No, sir.

Q. You never at any time inquired to find out who Mr. Sparks was?

A. I didn't know Mr. Sparks' capacity until after the loss.

Q. Do you know who you talked to when you called the Insurance Company of North America?

A. I didn't talk to anybody but the switchboard operator.

Q. Now, you expected these letters to be delivered on the 3rd of August to these two insurance companies?

A. Yes, sir. I deposited them on Monday and I expected they would be delivered on Tuesday.

Q. You were at that time down at 510 West 6th?

A. Yes, sir.

Q. Where was the General Accident located at that time?

A. In the Spring Arcade Building, I believe.

Q. Are you familiar with the fact that on Spring Street there for a period of time that mail was very slow?

Mr. Miller: Just a moment. May we ask that the question be read to the court? We would like to interpose an objection.

The Court: Yes. Please read it.

(Testimony of Charles Richard Love.)

(The question was read.)

Mr. Miller: We object to the question upon the ground [203] there is no proper foundation laid. There is no reference to the time, and it would be entirely a matter of conjecture, immaterial.

Mr. Davis: I will fix the time for you, counsel.

Q. (By Mr. Davis): During the period of approximately the time when you say these communications were mailed, do you recall that at that time you were having difficulty with your mail, your mail was slow down there?

A. May I ask you for clarification?

Q. Yes.

A. Do you mean I was familiar with the fact the post office was delivering the mail slowly at that particular time?

Q. Yes.

A. No, I have no knowledge of that.

Q. On Spring Street.

A. I wouldn't have any way in the world of knowing that.

Q. Do you know of a time when the mail went to the Spring Street distribution office and then to the Post Office while you were down there on Spring Street in 1954?

A. I wasn't on Spring Street in 1954, Mr. Davis. I was up on 6th Street.

Q. 6th Street, I should have said. I was on Spring Street, that is why I was asking.

A. No, sir, in answer to your question. [204]

(Testimony of Charles Richard Love.)

Q. If you don't know, say so.

A. I don't know anything about it.

Q. At any rate, you got no telephone call on the day following the mailing except from Mr. Sparks?

A. I didn't get a telephone call on the day following the mailing from Mr. Sparks.

Q. When did you get the call from him?

A. The first call came on Thursday.

Q. That was two days following the call——

A. I mailed it on Monday. That would be the third day.

Q. You got no call at all from the General Accident? A. No, sir, nothing.

Q. You were familiar at that time with the fact that the General Accident was quite slow in answering matters of this kind, were you not?

A. Yes, sir—I would change my answer. No, sir, I wasn't familiar at that time.

Q. Had your previous experience been with the General Accident that they were short-handed and a little slow in answering communications?

A. Yes, sir, two years prior to that.

Q. Not before that. So when you didn't get a call from anybody on this, you never called them, called the company to find out why you hadn't had an answer, did you? A. No, sir. [205]

Q. You took no further action yourself, other than sending these communications?

A. No, sir; that is correct.

Q. That is all you did? A. Yes, sir.

(Testimony of Charles Richard Love.)

Q. And you made no communication with Mr. Esposito or anybody else in connection with this?

A. No, sir.

Q. And these two communications were the entire transactions between yourself and the companies that occurred prior to the fire, during the period, we will say, from July 31st until after the fire? A. Yes, sir.

Mr. Davis: I think that is all.

Redirect Examination

By Mr. Miller:

Q. Mr. Love, you were interrogated about the mailing system of the Spring Arcade Building. How many blocks away from your office was the General Accident office in August, 1954?

A. About three to four blocks.

Q. Now, counsel interrogated you about not taking any other action after these letters were sent to General Accident and Insurance Company of North America.

Did that include not placing—strike that. [206]

If you had received during the period from August 2nd to August 6th any communication from either General Accident or North American that they declined or wouldn't go for this additional insurance, could you have placed it with any other company?

Mr. Davis: Just a minute. I object to that as calling for a conclusion of the witness. The fact

(Testimony of Charles Richard Love.)

remains we are liable if we have a contract, and if we don't have a contract we are not liable. What difference does it make?

The Court: Sustained.

Mr. Miller: May I be heard a moment on that, your Honor?

The Court: All right.

Mr. Miller: Counsel interrogated the witness as to whether he took any other action. I think that we have a right to show that he didn't take any other action, because he considered the additional insurance in effect, and that if he hadn't received any other advice that he could have placed this additional coverage with some other company; the Insurance Company of Pennsylvania.

The Court: The ruling will stand.

Q. (By Mr. Miller): You testified, I think, during your cross-examination by Mr. Davis about a dual capacity as broker and agent.

Will you explain what you mean by that [206-A] term?

Mr. Davis: I object to that as improper redirect examination. I asked him that exact question and he answered it exactly—I asked him in that exact language.

The Court: Overruled.

The Witness: Well, Mr. Miller, according to the Insurance Code an agent is appointed by the company and represents the company. But, in fact, if he did nothing but represent the company he probably wouldn't sell much insurance. He contacts

(Testimony of Charles Richard Love.)

these accounts, builds up his accounts through good will, and over a long period of time, and, by and large, the public who deals with an insurance agent considers he is their agent.

That is what I meant by dual capacity. They consider you represent them. Whereas, in effect, you technically do not.

Mr. Miller: That will be all.

Mr. Davis: That is all.

(Witness excused.)

Mr. Miller: Plaintiff rests.

The Court: I don't think we will start the defense this morning.

Now, are we going to start immediately with witnesses, or are there legal matters?

Mr. Davis: I think I want to make a motion, your Honor.

The Court: We will reconvene at 1:45. [207]

The jury, however, need not come in until 2:30.

These little arguments we have of these matters sometimes take considerable time. I don't like to have you just waiting around here in our jury room. The jury will please be here at 2:30. Bear in mind the admonition the court has given you.

The court will stand in recess until 1:45.

(Whereupon, at 11:55 o'clock a.m., a recess was taken until 1:45 o'clock p.m.) [208]

Wednesday, June 20, 1956. 1:45 P.M.

(Whereupon, the following proceedings were had out of the presence and hearing of the jury:)

The Court: I understand you have a motion.

Mr. Davis: Yes, your Honor.

Plaintiff having rested, defendants and each of them separately moves the court to direct the jury to return its verdict in favor of defendants and each of them upon the ground and for the reason that plaintiff's evidence has failed to establish the facts or inferences therefrom upon which a verdict of the jury could be based in plaintiff's favor against defendants or either of them, specifically in that there is no evidence that defendants or either of them entered into an oral contract of insurance with the plaintiff's assignor.

2. There is no evidence that anyone authorized by defendants or either of them entered into an oral contract of insurance with plaintiff's assignor.

3. There is no evidence or inference therefrom that defendants or either of them are estopped to deny that the oral contract was entered into by them or either of them.

4. There is no evidence that witness Charles Richard Love had any authority to enter into an oral contract of insurance on behalf of defendants or either of them. [209]

5. There is no evidence that Charles Richard Love did enter into any oral contract with plaintiff's assignor on behalf of defendants or either of them.

6. There is no evidence that any of the essential terms of an insurance contract were ever agreed upon between plaintiff's assignor and defendants or either of them.

Now, in support of the motion, and analyzing the evidence, the undisputed evidence, it seems to me, no matter how you look at the evidence here, there has been no contract established.

If we assume, for the sake of argument—which we do not admit at all—that Love had authority to contract for each of these defendants, the evidence is conclusive that no such contract was made.

If Love had authority—and let's assume for this portion of my statement, grounds and argument, he had to contract with somebody. He couldn't contract with himself, and the only person, therefore, if he was acting on behalf of the defendants, that he could deal with, would be the plaintiff's representative Mr. Esposito, who, the testimony shows, is the only person representing the plaintiff, that there was any dealing with.

In other words, this case to me, except for the necessary elements of the contract in which the insurance contract may differ from others, but except for that it must be [210] resolved upon the most simple and fundamental rules. Parties to a contract, parties competent to contract, parties whose minds have met.

Now, taking the first assumption that Love, whom they tried by all sorts of twistings and turnings, to create into an agent for both of these defendants, could, as I have said, contract only with somebody

else, and that somebody else had to be the plaintiff, because they are claiming that the contract was entered into.

Testimony is conclusive and draws no other inferences, that there was no contract consummated between Love and Esposito. Your Honor will remember the last of my cross-examination, and it was definite and positive, and Love was definite and positive. Did he agree with Mr. Esposito what companies the insurance was going to be in? No.

Did he agree upon the amount each company would take? No.

Did he agree upon when the insurance was to commence? No.

And all down the line. And the final "No," there was nothing consummated in his last meeting with Esposito, other than that he told Esposito he would inquire and see whether he could place the insurance. That is a clear-cut as anything in the world can be. And by no torture whatsoever can we create a contract out of that episode. [211]

And suppose we take the other theory counsel has wandered back and forth between—suppose we take the theory here that Love was the agent of Campagnola, their representative and their proctor, acting on their behalf, again he would have to deal with somebody. He would have to make a contract with somebody representing the party on the other side. In other words, he would have to have a meeting of the minds upon all the essential elements of the contract.

Now, unless we can say that these two documents,

Plaintiff's Exhibits 4 and 5, which were sent and which were received, constitute the contract, then we have no contract, taking that theory of approach. In other words, unless we can, contrary to a great weight of authority—all the authority, in fact, on a situation of this kind—and on any other situation where a contract is made, an offer and a proposal, we just don't have to go beyond our law school rules of contract.

Now, let's assume that these letters were a proposal on behalf of Campagnola to the Insurance Company of North America and General Accident, which, in their very language, are not a direct offer. They are in the nature of an inquiry, "Will you endorse to increase your line to $27,000.00 part of total line of $88,000.00? Advise immediately."

There is not even in that a proposal that if the company had immediately answered and said yes, would it have created [212] a contract, because he doesn't say, "I offer to place. I offer to contract with you"; merely an inquiry.

What could he have done? He could have come back and said, "Well, I am sorry, I have placed it somewhere else. You don't have a contract with us." Anything like that could happen. There would not have been a contract created thereby.

But let's assume, go further and assume that this was a direct proposal, that "We offer you this much. Will you accept it?"

They say "Yes," and there would be a contract.

We will say there was such; this is an offer. The offer was not accepted.

Now, we come to the last, to make that contract, and again we will have to go in the face of all the authorities, that the contract cannot be created by the agent of one person only. I am talking fundamentals. I will give your Honor just a world of citations on insurance cases. I have already given you quite a number in our reference under our instructions. I have used the Working case, simply not because it is the only one—I have stacks and stacks and stacks in a brief covering the same thing—but because Judge Valle, in writing that opinion, did epitomize a great deal of this law, and it is there in an easy form to get at.

In order to make a contract on this second assumption [213] then, we have to say that because the companies didn't say yes or no, within those two or three days intervening, that there was a contract.

But the rule in insurance contracts, as well as any other contracts—your Honor has seen and read our proposed instructions in which there are literal quotations—insurance contracts are based upon the same rules of law as any other contract. We would have to say that the mere sending of this letter, to which no reply was given, created a contract.

That is our case in a nutshell and that is why I say that we are entitled to a directed verdict in both cases, because the plaintiff has not shown in any way, shape or form an oral contract of insurance consummated before the fire.

The Court: For your information, Mr. Miller,

I have no problem with the question of agency. I don't mean to say that I decided the question of agency because it is a fact matter. I think there is sufficient evidence on the question of agency that it would be a jury question.

The question of privity, however, on the subject matter is a big question here.

Mr. Miller: I myself, your Honor, recognize the many problems in this case. We lawyers don't make the facts. They are presented to us and we make the most of what we have.

But in my study of this case, I have been most impressed [214] with the views of our state appellate courts, California courts of recent date, in the field of insurance, and particularly with reference to what constitute a contract, oral contracts of insurance.

The courts have recognized the custom in placing insurance and matters of that kind.

I would like, with the court's permission, to refer to a case, a rather recent case, Guipre v. Kurt, 109 Cal. App. (2d) 7, in 1952. In this particular case a young man stationed, I believe, at one of the Army camps at Santa Ana, purchased a car. He was in the Army, and as part of the deal he desired to acquire some insurance. So he was referred to some broker in Santa Ana, who couldn't place the insurance himself, but the broker in Santa Ana called a broker in Anaheim, who in turn called the general agent in Los Angeles.

During the interim of about six or seven days a loss also occurred. This did not involve fire insur-

ance. It involved a liability insurance in connection with the car.

Now, the court in this particular case held that under the circumstances, since there was a question of the agency—and it was a question of fact—and before I say anything further, the court held it was a question for the jury, whether there was an agency in that case at all.

The court said at page 16:

"The question of Miss Oliphant's ostensible [215] agency was a jury question and was apparently submitted to the jury under proper instructions." The court said at page 14:

"It is argued that the evidence here is insufficient to support the implied finding of the jury that appellant company, by its own acts or the acts of its authorized agent, enter into such a contract; that Morris was not an agent of appellant and could not bind the appellant company to an oral contract of insurance with Guipre; that although Kurt Hitke and Company, Inc., was an agent of appellant company, it did not have actual or ostensible authority to bind it to such a contract; and even though it may be assumed that it did have such authority, the elements of an oral binding contract of insurance were not present.

"We have here a lay person making a regular application for insurance on his automobile to an insurance agent who, in accordance with the adopted custom, informed him that his automobile was covered, according to the requirements of the loaning agency. He was informed that such cover-

age was immediate, as of the date of the oral ratification by such agent."

Now, let me pause at this point and direct the court's [216] attention to the fact that in this particular situation we have the testimony that the custom was that on the delivery of a notification of this kind to a company, without advice within 24 hours or 48 hours thereafter declining it, that it is accepted practice it has been accepted; that its agent's acceptance is proper.

Now, the testimony in this case was that he occupied, Love occupied a dual capacity; one, as agent for the company, and two, as broker for the individual. For the individual he placed the insurance. For the company he committed it and bound it.

Now, with the assumption that there is an agency —and I think in view of your Honor's statement here that it is a question for the jury—then we must take the testimony in the most favorable light here for the plaintiff on this type of motion.

And we, therefore, say that in accordance with custom and usage that Mr. Love, acting as a subagent, and Mr. Klee committed the company, because the company didn't answer the notification in accordance with custom.

The Court: What did Mr. Esposito buy? What were the terms?

Mr. Miller: The purchase was this: $50,000.00 of insurance, of which we are only concerned in this case with $14,000 for General Accident and $15,000.00 for North [217] American.

The testimony was that the risk covered was this

equipment that was under the original fire policies. The testimony was that the duration or term of insurance was coextensive with the original policy. It didn't go beyond the expiration of the oral policy.

The effectiveness of that additional insurance ran from the time that he sent his memo to the company, and I think the testimony was that the premiums payable woud have been from that effective date. And the premiums testified to were those in the original policy insofar as the rate was concerned.

The Court: From whom did Esposito think he was buying the insurance?

Mr. Miller: When we consider that Mr. Love was acting as a broker for Campagnola in placing the insurance, the knowledge of Mr. Love in that respect is the knowledge of his principal, Campagnola, and his knowledge was that he was placing $14,000.00 with General Accident and $15,000.00 with North American, and $21,000.00 with Pennsylvania.

Now, I say that his knowledge is the principal's knowledge to that extent. Now, that is customary, and, as the court in numerous of these cases, both the Guipre case and a very late case, Kanzanito in 1955, by the Supreme Court, indicates the important part that almost judicial knowledge in connection with the insurance business lies in these [218] cases.

And, to answer the question further, it seems to me that if we take Mr. Davis' argument and accept it, he argued that Mr. Love is the broker for Campagnola. Therefore, I say his knowledge is

Campagnola's knowledge to the extent of placing that insurance and obtaining it.

And insofar as binding the companies is concerned, he is acting as subagent under Klee, and that is the practice. He wrote the original policy in this case. He was the broker there. But he signed his name as agent for General Accident. There is that dual capacity and it must be recognized, let's say, not as a matter of fact and custom, but as a matter of law.

I assume that we should take his statement for face value. He said there was a dual capacity. And I say, under these circumstances, that is sufficient. There has been the oral contract of insurance. We can't close our eyes to what is common in the insurance field.

And as the court says in the Guipre case a little later:

"Where there is a known usage of trade, persons carrying on that trade are deemed to have contracted in reference to the usage, unless the contrary appears; and the usage forms a part of the contract. Evidence of usage is always admissible to supply a deficiency or as a means of interpretation where it does not alter or vary the terms of the contract." [219]

The court says:

"If automobile liability insurance companies and agencies are going to deviate from or alter the general practice of accepting oral applications for such insurance by authorized agents and require written applications for such policies and a previ-

ous approval by the company itself before the issuance of such policies and before liability shall attach, the burden to examine into the changed policy or limited authorization of such agent should not be cast upon the applicant. It is a matter of common knowledge and experience that insurance agencies do represent several companies in the automobile insurance field and that oral application to such an agency is ordinarily considered accepted when approved by such agent, and the responsibility of selecting the company to cover the risk is with such agent. Under these conditions, in case of loss, the applicant should not be made to suffer by reason of some undisclosed agreement or change of policy between the agent and the company as to the method of procedure pertaining to such coverage, particularly where the company allows its authorized agent to transact such business in accordance with the custom mentioned."

And I say in this particular case they are definitely [220] bound, they have been bound by their own agent. They allowed Mr. Klee, under the terms of his general agency, to issue and bind the company. And Mr. Klee has delegated or authorized Mr. Love, as his subagent, to do the very things he could do.

And the mere fact, your Honor, that there wasn't any specific statement, "I hereby authorize you in writing, Mr. Love, to do those things," doesn't mean that the subagency wasn't created, and that those things can be done by implications, and, as the courts have recently said, the facts and circum-

stances show that the subagency was created.

In 29 American Jurisprudence 120 it is said, "An insurance agent has implied authority to appoint subagents and assist, and if reasonably necessary"——

The Court: I have told you, Mr. Miller, I have no question in my mind but what on the matter of agency there is a case for the jury.

What bothers me is the question of privity here of offer and of acceptance, as between the assignor to your claim and Mr. Love. What was offered? What was accepted? How, by what means? With what definiteness or lack of definiteness? How can we determine the terms that were struck, if your cause of action is to be maintained? We have to find a contract arrived at at that point, don't we?

Mr. Miller: Well, I agree that we must have a contract, [221] but the method of arriving at that contract does not require a statement, "I offer," and someone to say, "I accept." If the conduct of the parties indicates there was an offer and acceptance, the contract exists.

Now, your Honor mentioned what were the terms. And I thought that I had touched upon that before.

The Court: You have. You were going off partly on extended argument on this matter of agency, and on that I don't think you have to.

Mr. Miller: Then I would say with reference to the matter of contract, let's assume in this case that there was no relationship between Mr. Love and Mr. Klee. That Mr. Love was the broker for Campagnola. And Campagnola says, "Mr. Love, can

you get me that $50,000.00 worth of insurance that we have discussed? We need it now."

Mr. Love says nothing further, but he contacts Mr. Klee and he says, "Mr. Klee, will you place $14,000.00 with General Accident and $15,000.00 additional with North American?"

Mr. Klee says, "Yes." Mr. Klee sits down—he says, "I will take that. That coverage is O.K. I am going to send my company a notice." And he sits down and sends these notices, but instead of putting Love's name on one, puts Klee's name on one; Klee's name is already on one. But he sends them both and he doesn't hear, Mr. Klee hears nothing [222] from his companies.

He then takes the position, and he calls Mr. Love and he says, "Not having heard from my companies, what I told you is true and you are covered for $14,000.00 and $15,000.00."

Now, I respectfully submit that under those circumstances there would be a contract. Now, let us substitute for that one factor, that Mr. Love still retains his brokerage position, but also acts for Mr. Klee and does all the things that he recited here Mr. Klee did.

And I say that, under those circumstances, considering the dual capacity, that there was a contract, and that dual capacity apparently was recognized and ratified by the companies over a period of time in the previous dealings on these policies.

To that extent I respectfully submit that there is enough evidence here, and the inferences to be

drawn from the evidence, from the custom, to justify a jury determining that there was an oral contract of insurance.

Now, it is unfortunate that the insurance business is not handled otherwise. The courts have recognized it is a common practice to merely telephone and place insurance in this way, and I would like in that respect to read a little more from this case, if the court will be patient with me.

The Court: Surely.

Mr. Miller: Page 15 from the Guipre: [223]

"Notwithstanding Lynch's testimony to the contrary, the surrounding circumstances indicate an authorization by him for her to act as his agent in this respect. As pointed out by respondent, in modern practice much of the business of the agency insurance company is conducted over the telephone. New insurance in various forms, as well as increased coverage on existing insurance is commonly ordered by telephone and if an application is accepted by a clerk who undertakes to speak for the agent, an enforceable insurance contract results."

And the court proceeds to cite cases, federal cases and other cases.

We submit that we should in this case give recognition to what is the common custom and practice, custom and practice does make part of this contract. It seems to me that if the rule is to be otherwise, then the insurance companies should announce that they will do no more business in this fashion by telephone and through agents and brokers and subagents, so the world will know it.

But insofar as the Guipre case is concerned, and the recent case of Snyder v. Redding Motors, in 131 Cal. App. (2d) 416, and a more recent case of Kanzantino v. Cal-Western, 137 Cal. App. (2d) 361, they recognize the informality of these transactions as constituting contracts, and they do not take [224] the narrow view of the law school days of offer and acceptance. They recognize that these things constitute offer and acceptance in the contract.

I respectfully submit the plaintiff in this case, I do know, has the burden of proof and it has been a very heavy burden for us, because we must prove our case by the people in the insurance business. We can't prove it by employees of the insurance companies themselves. We are very fortunate in this case to at least have these insurance agents and brokers testify as they have.

But if the court should grant a motion of this kind, it is the equivalent of saying that there cannot be a contract of any kind, under circumstances of this character, where an agent speaks for an insurance company and speaks for the insured.

Here he gives the insurance company the business, and, on the other hand, he gives the assured, the principal, from that point of view, the insurance he requires. Both of them having selected this man to act in a dual capacity, they are bound by him, and I say the insurance company is bound by his acts.

If there is anything else I can submit to the court, I think it would be merely repetitious of whatever else I have said.

The Court: There is no doubt but that this case is not [225] within the statute of frauds, and that an oral contract of the type which you contend was made here can lawfully be entered into and the courts enforce it.

However, on the evidence in this case, I think that the evidence would not support a finding that such a contract was arrived at. There is still the requirement of the law that there be offer and acceptance, and that the heart or essence of the contract at least be clear, that a meeting of the minds—what they taught us in law school under the name of privity of subject matter—must exist. The evidence here just doesn't spell that out.

I think the question of agency is one in which the plaintiff has made out a pretty good case; at least, a jury case.

On the question of making of a contract, such as has been sued upon here, or such as has been contended to exist, that you just haven't. And if I sent it to the jury and the jury decides there was, you would be put to the work of attempting to sustain it in the appellate court, and they wouldn't sustain it.

Now, I think that the insurance companiles have behaved rather badly in this case. The earlier portion of the case which were disposed of here, where liability had been denied and then some of the pretrial procedures developed there was no real basis for not paying, that those things should not have occurred here. [226]

But I had rather expected from the fact that there had been a sham defense there for a long time, that the defense to the cause of action before us today would also turn out to be sham. But those are expectations, and knowing you to be an industrious lawyer, Mr. Miller, I thought you had the evidence and would probably produce the evidence here to sustain your position. But I just can't see it.

I will make a finding, because you are acting for an assignee for benefit of creditors, there was probable cause for the bringing of the action. You have done very good work here and it justifies considerable compensation. But it doesn't prove a cause of action, such as has been alleged.

Now, motions for directed verdict are obsolete in these courts. Under the present Federal Rules of Civil Procedure, the proper motion is a motion to dismiss. And in granting the motion of each defendant to dismiss the case the court intends to do no more than grant what would be a motion for nonsuit under the law of California.

So the order will not provide that the dismissal is with prejudice.

Mr. Davis: Your Honor, my motions then are deemed amended to be motions to dismiss?

The Court: Oh, yes. They have been considered as motions to dismiss.

Mr. Davis: I wasn't aware of that. I guess I am getting [227] obsolete in my rules. The old rules refer to motions for directed verdict, in 1953.

The Court: These motions are so rarely granted that I wasn't too sure about it myself and, in fact,

I think it is just a matter of form here which way it is cast.

Actually, I came to this bench in 1951 and this is only the third motion of this kind which I have granted, because generally these are questions of fact which should be analyzed by the trier of fact, and the trier of fact to express the decision on it. But there is just not sufficient evidence of contract at the Esposito stage of the case, which is where the contract was arrived at, or the terms stated, to justify sending the case to the jury.

I am sorry, Mr. Miller, but that is——

Mr. Miller: May I ask the court this: Whether under Rule 41, I think it is (b), whether or not it would be necessary to have findings in connection with this.

The Court: Oh, no. No, there is no necessity for findings, because findings of fact in a jury case is made by the jury by its verdict. And the court is simply holding there is insufficient evidence to submit the case to the jury. That doesn't require a written finding of fact.

It does require an order of dismissal, and the court directs it not be prepared in form to direct a dismissal with prejudice. [228]

Mr. Miller: I feel this: If the motion had been made as counsel made it, a motion for directed verdict, after all the evidence had been in, it would have been one thing.

The thing that concerns me, I don't know what the future holds in this case, but if a review should be sought and if perchance we should be successful

in a review, then it would necessitate a complete retrial of this case.

On the other hand, if the motion were as counsel made it a motion for directed verdict, which usually is after all the evidence is in, the plaintiff's and defendants', if your Honor should grant a motion for directed verdict after the evidence is all in, then it is a question of whether that verdict would be justified or not, and it wouldn't require a retrial ultimately if we should be successful in our position.

In other words, what I am trying to avoid is a second trial in this case. I feel a hearing of the defense in this case and thereafter a motion of this kind would obviate the necessity of a second trial in that event.

The Court: They would still be entitled to have the jury find on the facts. So there would have to be a trial.

If a motion such as has been granted now were granted at the close of the defendants' evidence, the jury would not pass upon the facts. So we would still have to have another trial, if I am wrong on this. [229]

Mr. Miller: The only answer procedurally would be the practice such as we have in the state court, that once the verdict has come in, a judgment notwithstanding the verdict, and that would be tested in the same method as a motion for a nonsuit is, and, of course, if the motion is well taken, that is the end of it. But if it isn't, why, the court reinstates the original verdict, without the necessity of the second trial.

There isn't much time that we would consume in the defense, and I am wondering whether or not that wouldn't be the proper procedure here, to avoid a subsequent trial, if we should be right in our position.

The Court: No, I think where the evidence is clearly insufficient to support a verdict, if the jury were to return one in your favor, it is the duty of the court to grant the motion.

I am sorry. I hope you come back with a better case, Mr. Miller.

Mr. Miller: Well, as I said at the beginning, your Honor, we don't make the facts.

The Court: I don't mean on this controversy. I hope I have heard the last of this controversy. I hope you come in here with a good case on behalf of someone else.

Mr. Miller: Well, I will try. I think I must respectfully differ with your Honor. I think we have a good case, [230] but we don't have all the evidence probably that is necessary for a good case. I think the cause is a meritorious one.

The Court: It might be if the evidence could be all sought out and produced, and that is why I am having the dismissal without prejudice. So that if you can find adequate evidence to establish the terms of a contract, the acceptance, the meeting of the minds, in other words, on the critical features, then all you have to do is file a new lawsuit——

Mr. Miller: Thank you.

The Court: ——and I am sure whatever judge

gets the new case, if you do file one, in the light of the fact that this present case has had the experience that it has, would give you an early trial date.

Mr. Miller: Thank you. I will make every effort. I want to thank your Honor for the courtesy and patience which you have shown to all counsel in this matter.

The Court: Thank you.

Mr. Davis: I think that goes without saying, your Honor, but we do, too.

The Court: Thank you, Mr. Davis.

Now, will you bring the jury in and we will excuse them.

Counsel needn't wait unless they desire to.

Mr. Miller: May I inquire about the formalities of the [231] preparation of a judgment? Do counsel have the responsibility of preparing the form——

The Court: Counsel that prevails on the motion has the responsibility of preparing one. I hope it will be done with as much dispatch as possible, because I am about to go to sit in another district and I would like to get this out of the way.

Mr. Davis: It will be a motion, recitation of motion to dismiss. Do we put in the preamble, I mean the grounds?

The Court: You don't have to.

Mr. Davis: I was just wondering, under the rules. I will get my rules up to date and try to get it done.

The Court: This will be a good thing to let Junior spoil his week end working upon.

(Whereupon, at 2:31 o'clock p.m., Wednesday, June 20, 1956, an adjournment was taken.) [232]

Certificate

I, Virginia K. Wright, hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 27th day of August, A.D. 1956.

/s/ VIRGINIA K. WRIGHT,
Official Reporter. [233]

[Title of District Court and Causes.]

Nos. 17589-T and 17590-T

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 46, inclusive, contain the original

Amended Complaint for Declaratory Relief Cases 17589-T & 17590-T;

Answer to Amended Complaint Cases 17589-T & 17590-T;

Second Amended and Supplemental Complaint Cases 17589-T & 17590-T;

Stipulation for Answer to Second Amended and Supplemental Complaint;

Judgment of Dismissal;

Notice of Appeal from Judgment;

Designation of Record on Appeal;

which, together with a full, true and correct copy of the Minutes of the Court for March 30, May 21, May 25, June 19, and June 20, 1956; and a photostatic copy of Undertaking for Costs on Appeal; plaintiff's exhibits 1, 2, 3, 6 & 7; and 2 volumes of reporter's transcript of proceedings, all in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above case.

I further certify that my fees for preparing the foregoing statement amount to $2.00, which sum has been paid by appellant.

Witness my hand and seal of the said District Court this 19th day of September, 1956.

JOHN A. CHILDRESS,
Clerk.

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15315. United States Court of Appeals for the Ninth Circuit. M. W. Engleman, as Assignee for the Benefit of Creditors Generally of Campagnola Food Products, Inc., a Corporation, Appellant, vs. General Accident, Fire and Life Assurance Corporation and Insurance Company of North America, a Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed September 21, 1956.

Docketed: October 3, 1956.

/s/ PAUL P. O'BRIEN,
the Ninth Circuit.
Clerk of the United States Court of Appeals for

United States Court of Appeals
for the Ninth Circuit
No. 15315

M. W. ENGLEMAN, as Assignee for the Benefit of Creditors Generally of Campagnola Food Products, Inc., a California Corporation,

Appellant-Plaintiff,

vs.

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, a Corporation,

Appellee-Defendant.

M. W. ENGLEMAN, as Assignee for the Benefit of Creditors Generally of Campagnola Food Products, Inc., a California Corporation,

Appellant-Plaintiff,

vs.

INSURANCE COMPANY OF NORTH AMERICA, a Corporation,

Appellee-Defendant.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY

The appellant, M. W. Engleman, as assignee for the benefit of creditors generally of Campagnola Food Products, Inc., makes the following points on which the appellant intends to rely in this appeal:

(1) The District Court erred in granting the appellees' motion for the dismissal of the actions, and in signing, filing and entering the judgment of

dismissal of the actions, and in holding that upon the facts and the laws the plaintiff was not entitled to any relief.

(2) The District Court erred in not allowing the case to go to and be decided by the jury.

(3) The District Court erred in holding that the evidence would not support a finding by the jury that there was an oral contract between the insured and the insurance companies, through their respective agents, whereby the amount of insurance under existing fire insurance policies was increased.

(4) The District Court erred in holding that the evidence, including the surrounding circumstances and proper inferences, in view of the agency relationship found by the district judge, could not constitute an offer and acceptance and oral contract for the additional increased amount of insurance coverage, and could not be so found by the jury.

(5) The District Court erred in holding in substance that the informal methods of handling insurance coverage, customary in the insurance business in the community, did not as a matter of law constitute an enforceable contract of additional insurance coverage as between the insured and insurance companies.

/s/ HARRY J. MILLER.

Attorney for Plaintiff and Appellant, M. W. Engleman, as Assignee for the Benefit of Creditors Generally of Campagnola Food Products, Inc., a California Corporation.

[Endorsed]: Filed Oct 3, 1956.